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In the

SUPREME COURT OF THE UNITED STATES

(OCTOBER TERM, 1959)

No. 276

ROBERT WESLEY FINLEY,
Petitioner,

VERSUS

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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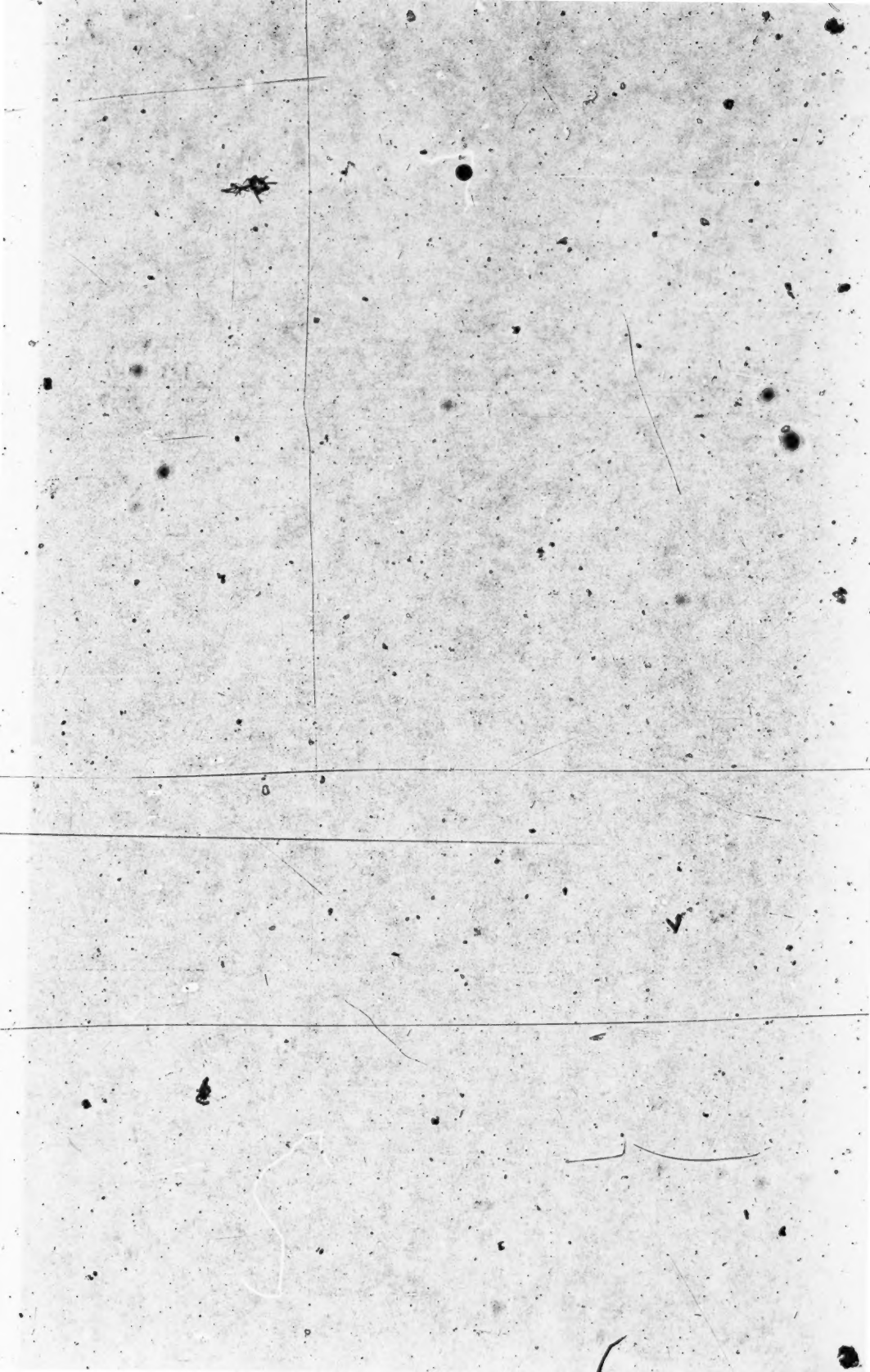
August, 1959.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8780



SUBJECT INDEX

	PAGE
Statement	1
Opinions Below	1
Jurisdiction	2
Jurisdiction of this Court is invoked under Title 28, U.S.C., Sec. 1254(1)	2
Questions Presented	2
1. Whether the opinion and judgment of the United States Court of Appeals, Tenth Circuit, is erroneous and in conflict with the rules of The Tax Court, the Federal Rules of Civil Procedure or the usual and accepted practice in a judicial proceeding, when said court held that the appellee could amend its answer six months after this record was closed on evidence not in this record but allegedly on competent evidence on a different issue in another proceeding to which this appellant was not a party and where all the facts were known to appellee when the assessment herein was made, when the answer was filed, and when the issues to be tried in this proceeding were agreed to by the appellee in open court	2
2. Whether said Appellate Court erred in permitting appellee to amend this Record on Appeal to include evidence offered in a trial on a different issue in another proceeding to which the appellant was not a party, not designated as a part of this Record on Appeal under said Appellate Court's Rule 33, and not certified as a part of this Record by the clerk of The Tax Court	2

INDEX CONTINUED

PAGE

3. Whether the United States Court of Appeals, Tenth Circuit, and The Tax Court erred in refusing your petitioner a statutory adjustment of the net basis on air conditioners in calculating the deficiency in a Tax Court Rule 50 computation, due to an adjustment in this proceeding of the allowable depreciation 2

Court Rules-Statutes 3

First and Second Assignments of Error 3

Third Assignment of Error 4

Statement of the Case 5

Summary 5

Detailed Statement of the Case 6

First and Second Assignments of Error 6

Third Assignment of Error 11

Facts on the Issue 11

Reasons for Granting the Writ 15

(a) When said court permitted an untimely amendment to appellee's answer and then on appeal permitted appellee to enlarge this record on appeal to justify said untimely amendment 15

Argument 18

(b) When said court denied appellant a hearing on a statutory adjustment in the computation of the judgment under Tax Court's Rule 50 22

Conclusion 22

INDEX CONTINUED PAGE

INDEX TO AUTHORITIES

CASES:

American Fork & Hoe Co. v. Stampit Corporation (C.A., 6th), 125 F.2d 472 16
Askins v. Overholser (C.A., D.C.), 170 F.2d 815 17
Chapman & D. Lumber Co. v. St. Francis Levee District, 234 U.S. 667, 58 L. Ed. 1526, 34 Sup. Ct. 906 18
Chapman Coal Company, In re (C.A., 7th), 196 F.2d 779 18
City of Anchorage, a Corp. v. Alaska Dairy Pro. Corp., 261 F.2d 873 17-18
Commissioner I. R. v. Erie Forge Company (C.A., 3rd), 167 F.2d 71 16
Cutter v. Arlington Construction Co., 268 Mass. 88, 167 N.E. 266 16
Deming, John L., & Co. v. Fleming (C.A., 10th), 160 F.2d 697, 694 16
Dictograph Prod. Co. v. Sanotone Corp. (C.A., 2nd), 231 F.2d 867 17
Dobson v. Clems, 194 Iowa 1155, 191 N.W. 184 16
Heath, et al. v. Helmick (C.A., 9th), 173 F.2d 156 17
Hoskins v. Fisher, 8 Sup. Ct. 834, 125 U.S. 217, 31 L. Ed. 759, 762 17
Hughes v. Young, 58 Ariz. 349, 120 P.2d 396 18
Kearney v. Case, 79 U.S. 275, 20 L. Ed. 395, 396 17
Lighter v. McCord, 151 S.W.2d 362 17
Morrisdale Coal Co. v. Commissioner (C.A., 3rd), 97 F.2d 272 15-16
Pierce Pipe Line Co. v. Commissioner, 30 B.T.A. 470 15

INDEX CONTINUED

PAGE

Rudder, Petitions of, et al. (C.A., 2nd), 159 F.2d 695 17

Simms v. Andrews (C.A., 10th), 118 F.2d 803, 807 ..... 16, 17

Susquehanna Boom Co. v. West Branch Co., 110 U.S. 57, 28 L. Ed. 69, 3 Sup. Ct. 438 18

Swanson Mfg. Company, et al. v. Feinberg-Henry Mfg. Co., et al. (C.A., 2nd), 147 F.2d 500, 504 16

Uhl v. Phillips Petroleum Company, 164 Kan. 401, 190 P.2d 349 16

U. S. v. Hosmer, 76 U.S. 432, 9 Wall 432, 19 L. Ed. 662 17

West Amusement Co. Inc., 21 T.C. 486 16

STATUTES:

Federal Rules of Civil Procedure, Rule 15(b), 28 U.S.C.A. 3

Federal Rules of Civil Procedure, Rule 75(g), 28 U.S.C.A. 17

Title 28, U.S.C., Sec. 1254(1) 2

Tax Court's Rule 17 (a) and (d) 3, 15

Tax Court's Rule 50 ..... 5, 14, 22

TEXTBOOKS AND MISCELLANEOUS:

Rules of United States Court of Appeals, Tenth Circuit, Rule 33 3-5

138 A.L.R. 943 18

71 C.J.S., Sec. 285, p. 612 17

INDEX TO APPENDIX

Appendix A:

Memorandum Opinion, Tax Court, 1957-15, Filed January 28, 1957—Jacqueline Finley O'Shea, et al., Petitioners v. Commissioner of Internal Revenue, Respondent; Mulroney, Judge i

Decision, No. 54202 ix

Appendix B:

Opinion of the United States Court of Appeals for the Tenth Circuit, April 9, 1959; Pickett, Circuit Judge x

Tax Court Memo. 1957-16, R. E. L. Finley et al. v. Commissioner, Dockets 54206, 54207 and 54208 xvi

Motion of the Commissioner for Printing of Supplemental Record xviii

Objection to Motion of Commissioners to Enlarge on the Record in this Cause xx

Stipulation to Omit Material from the Printed Record xxi

Motion for Issuance of a Written Memorandum in Respect to Issues Raised in Computations Under Rule 50 xxii

Official Report of Proceedings—Robert Wesley Finley, Docket No. 54202 xxv

Docket No. 54202, Tax Court—Robert Wesley Finley v. Commissioner— Docket Entries xxx

Appellee's "Supplemental Record", pages 27-28, 29 xxxii

In the

Supreme Court of the United States

(OCTOBER TERM, 1959)

No. .....

ROBERT WESLEY FINLEY,
Petitioner,

VERSUS

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Robert Wesley Finley, petitioner, prays that a writ of certiorari issue to review the judgment of the United State Court of Appeals for the Tenth Circuit, entered on April 9, 1959, reported 265 F.2d 885.

OPINIONS BELOW

1. The Tax Court's judgment was entered on January 28, 1957, reported in Tax Court Memo. 1957-15 (Appendix A, *infra*, page i).

2. The opinion of the Court of Appeals for the Tenth Circuit on April 9, 1959, reported 265 F.2d 855 (Appendix B, *infra*, page x).

JURISDICTION

Petition for rehearing denied May 13, 1959. Jurisdiction of this Court is invoked under Title 28, U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the opinion and judgment of the United States Court of Appeals, Tenth Circuit, is erroneous and in conflict with the rules of The Tax Court, the Federal Rules of Civil Procedure or the usual and accepted practice in a judicial proceeding, when said court held that the appellee could amend its answer six months after this record was closed on evidence not in this record but allegedly on competent evidence on a different issue in another proceeding to which this appellant was not a party and where all the facts were known to appellee when the assessment herein was made, when the answer was filed, and when the issues to be tried in this proceeding were agreed to by the appellee in open court.

2. Whether said Appellate Court erred in permitting appellee to amend this Record on Appeal to include evidence offered in a trial on a different issue in another proceeding to which the appellant was not a party, not designated as a part of this Record on Appeal under said Appellate Court's Rule 33, and not certified as a part of this Record by the clerk of The Tax Court.

3. Whether the United States Court of Appeals, Tenth Circuit, and The Tax Court erred in refusing your petitioner a statutory adjustment of the net basis on air conditioners in calculating the deficiency in a Tax Court Rule 50 computation, due to an adjustment in this proceeding of the allowable depreciation.

COURT RULES-STATUTES

First and Second Assignments of Error

Tax Court's Rule 17 (a) and (d):

"(a) GENERAL.—A motion for leave to amend a pleading shall state reasons for granting it and shall be accompanied by the proposed amendment.

"(d) TO CONFORM PLEADINGS TO PROOF.—The Court may at any time during the course of the trial on the merits grant a motion of either party to amend its pleadings to conform to the proof in particulars stated at the time by the moving party. The amendment or amended pleadings thus permitted, shall be filed with the Court at the hearing or shall be filed in the office of the Clerk of the Court in Washington, D. C., within such time as the Court may fix."

Federal Rules of Civil Procedure, Rule 15(b), 28 U.S.C.A.:

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial on these issues."

Rules of United States Court of Appeals, Tenth Circuit, Rule 33:

"Review of Decisions of the Tax Court of the United States.

"2. Same—Record on Review.

"The provisions of Rule 73 (g) of the Federal Rules of Civil Procedure shall, with appropriate substitutions, be applicable with respect to the time for docketing the review and filing the record on review in this court, and in addition to the extension of time therein provided for this court, or any judge thereof, in its discretion, and with or without motion on notice, may extend the time for filing the record on review and docketing the review in this court provided the application made to the court, or a judge thereof, states the reason why the application is made rather than to the Tax Court. The provisions of Rule 75 and 76 of the Federal Rules of Civil Procedure shall, with appropriate substitutions, govern the preparation of the record."

Third Assignment of Error

"RULE 50. COMPUTATIONS BY PARTIES FOR ENTRY OF DECISION

"(a) Agreed Computations. * * *

"(b) Procedure in absence of Agreement.—If, however, the parties are not in agreement as to the amount of the deficiency or overpayment to be entered as the decision, in accordance with the report of the Court, either of them may file with the Court a computation of the deficiency or overpayment believed by him to be in accordance with the report of the Court. The Clerk will serve a copy thereof upon the opposite party, will place the matter upon a motion calendar for argument in due course, and will serve notice of the argument upon both parties. If the opposite party fails to file objection, accompanied by an alternative computation, at least five days prior to the date of such argument, or any con-

tinuance thereof, the Court may enter decision in accordance with the computation already submitted. If in accordance with this Rule computations are submitted by the parties which differ as to the amount to be entered as the decision of the Court, the parties will be afforded an opportunity to be heard in argument thereon on the date fixed, and the Court will determine the correct deficiency or overpayment and enter its decision."

STATEMENT OF THE CASE

Summary

1. Said Appellate Court permitted the appellee to amend its answer six months after the record was closed on evidence not in this record but allegedly on competent evidence on a different issue in another proceeding to which this appellant was not a party, in violation of a ruling made by the Tax Court in the trial, and in violation of a stipulation made in open court between the parties.

2. Said Circuit Court permitted appellee to amend this record on appeal to include matters not designated under said Court's Rule 33 and not certified as a part of this record by the Clerk of the Tax Court.

3. In the computation of the judgment under Tax Court's Rule 50, based on a hearing without notice to appellant, said court denied appellant a statutory adjustment of the net basis on air conditioners due to an adjustment of the allowable depreciation in this proceeding.

DETAILED STATEMENT OF THE CASE

First and Second Assignments of Error

This appellant and four other taxpayers filed separate appeals to the Tax Court for a determination of their income tax liability for the 1946, 1947, 1948 and 1949 tax years. In each of said appeals, the distributable net income, the partners and their shares of the distributable net income of FOSCO, a partnership, were common issues. There were personal issues in each appeal not common in the appeals of the other partners.[1]

All of said appeals were set for trial on the same Tax Court Docket. When the cases were called, it was agreed in open court that one of the partners appeals would be tried and that the Tax Court's determination on the FOSCO issues, in said taxpayer's appeals, would be binding on all the partners in their separate appeals.[1]

The appellant's appeal was called and the issues other than the FOSCO issues were to be tried.[1] The appellee, in open court, agreed to the issues to be tried.[2] This appellant reported the income of FENCO as a sole proprietorship in his tax returns. While agreeing on the issues to be tried in this proceeding, appellee advised the Tax Court that appellee was not certain that appellant was the sole proprietor of FENCO.[2] That the issue was complicated and appellee might want to plead in the alternative on this issue.[3] Appellee did not say or indicate that ap-

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[1] App. iv

[2] App. xxv-xxix

[3] App. xxvi-xxviii

pellee contemplated any other amendment other than in connection with the FENCO issue.[2] After advising the court, the appellee's attorney asked the Tax Court for a clarification on the rules of evidence.[3] Appellee asked the Tax Court if evidence offered in the prior proceeding (Dockets Nos. 54206, 54207 and 54208) could be referred to and considered on issues to be tried herein. The Tax Court ruled that it could not, that the Court had granted separate trials.[9] Then the Tax Court ruled: "if there is evidence that you need now to establish the issue in 54202 (appellant's appeal), even though it is similar to the evidence that was introduced the other day (in the prior trial), it will have to be introduced again."[3] After said ruling, the parties stipulated and the Tax Court then ordered that all the evidence in the prior proceeding on the FENCO issue, is hereby made a part of this record.[3]

Six months after the record was closed and after appellant's brief had been filed on the issues tried, appellee filed a motion to amend its answer.[4] The amended answer alleged that two FOSCO checks, one for $9,500.00 and one for $1,995.00, were taxable income to appellant. Appellant filed a response to said motion, objecting to said amendment on this issue as being untimely and not based on evidence in this proceeding.[4] Said motion was not set down for hearing. The Tax Court, in its judgment, permitted the amendment[5] even though there was no evidence of-

[2] App. xxv-xxix

[3] App. xxvi-xxviii

[9] App. xxvi-xxvii

[4] App. xxx

[5] App. v-vi

fered on said issue in this proceeding and even though there was no evidence offered on said issue in the prior proceeding.[6] There was some competent evidence offered in the prior proceeding on a FOSCO issue upon which appellee allegedly asserts a right to amend its answer in this proceeding.[7] The facts testified to in the prior proceeding were known to the appellee when the assessment herein was made, when the answer was filed, and when the issues to be tried in this proceeding were agreed to in open court. Said evidence was not designated by appellee as a part of this record on appeal under the Circuit Court's Rule 33, and was not certified as a part of this record by the Clerk of the Tax Court. Its consideration is contrary to the stipulation of the parties as to the issues to be tried in this proceeding.[2] Its consideration is contrary to the ruling of the Tax Court, made at the trial, that there would be separate trials on the personal issues herein and that if either party relied on evidence in the prior trial, on the FOSCO issues, regardless as to how similar, it had to be offered in this record to be considered.[3]

This appellant gave notice of appeal and did appeal the Tax Court's judgment permitting said amendment to the answer.[8] The Tax Court's judgment on the FOSCO issues was not appealed by a partner or by the appellee.[10]

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[6] App. xi

[7] App. xi-xii and xvi

[2] App. xxv-xxix

[3] App. xxvi-xxviii

[8] App. xxxi-xxxii

[10] App. x

Appellant filed his designation of the record to be certified to the United States Court of Appeals, Tenth Circuit, and served a copy on appellee as required under said Appellate Court's Rule 33.[8] Said appellee made no counter designation.[8] The record was prepared and certified to said Appellate Court by the Clerk of the Tax Court under the Federal Rules of Civil Procedure.

The appellee filed what it called "protective appeals" on other taxpayers' trials before the Tax Court, to bring up the record on the trial of the FOSCO issues to said Appellate Court. Said issue on the amendment to the answer, which is appealed by the appellant, could not affect any other FOSCO partner's tax liability. No FOSCO issue was appealed.[10] Such a maneuver was a subterfuge to get matters outside this record and the issues considered by the Appellate Court.

In said Appellate Court, appellee got the evidence on the FOSCO issues made a part of this record as a "Supplementary Record"[11] and considered by said Appellate Court over the objection of the appellant.[11] Then a stipulation was filed by the parties and approved by said Appellate Court, dispensing with the printing of portions of the record designated to be printed and permitting the parties to print the portions relied on in the appendices to their briefs.[12] Said Appellate Court, like the Tax Court, entered

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[8] App. xxxi-xxxii
[10] App. x
[11] App. xi-xiii
[14] App. xx
[12] App. xxi

a judgment against the appellant upon evidence outside this record, not certified to be a part of this record by the Clerk of the Tax Court. Said Court allegedly based its judgment on competent evidence offered in a prior trial of another proceeding on another issue, to which this appellant was not a party, in violation of the Tax Court's rules, the Federal Rules of Civil Procedure, and the accepted and usual practice of a judicial proceeding, in violation of the ruling made by the Tax Court at the trial, and in violation of the stipulation of the parties, made in open court. The appellant had no opportunity to object to the competency of said evidence on any issue. The issue raised in the amended answer was not litigated in this or in any other proceeding.

In the prior proceeding, the issue was whether $58,698.26 paid to a subcontractor was allowable contract costs.[7] There was evidence of exchanges of moneys between appellant and the subcontractor. These two checks, $9,500.00 and $1,995.00, were received by appellant and the funds deposited in his bank account. There was evidence of advances and payments of money to the subcontractor.[7] On the same day that appellant deposited the $1,995.00 check, the subcontractor cashed a check drawn on appellant's bank account for $1,095.95, which was a part of the same transaction.[13]

The Tax Court, in the prior proceeding, found that there were exchanges of moneys between the two men.[7] The determination here in *contra* to said finding in the prior case. Here the Court does not give appellant credit

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[7] App. xi-xii and xvi
[13] App. xxxii-xxxiv

for the sums of money paid by appellant to the subcontractor and does not recognize that there were exchanges of money between the two men. All the evidence in the prior proceeding, which would be competent on this issue, was not made a part of appellee's "Supplementary Record", or considered herein by either Court. Said issue was not tried herein. The judgment was entered on appellee's contention. The appellee's contention was not advanced until appellee had lost on the issue tried in the prior proceeding.

Third Assignment of Error

This assignment of error did not arise on a pleaded issue. It arose in the computation of the judgment on the Tax Court's report under the Tax Court's Rule 50.[15] There were several findings of the Tax Court involved in the computation of the correct judgment on this issue. Some of the findings involved were on pleaded issues and some on unpleaded issues. In the computation, appellee denied appellant a statutory adjustment on the net basis on air conditioners in determining the gain or loss on the sale of said air conditioners in 1949, under the Tax Court's Rule 50.

Facts on the Issue

The Tax Court determined that the partners of FOSCO were also the partners of FENCO, with like interest in each partnership.[23] Appellant had a 1/5th interest in each partnership. This determination was on an unpleaded issue.

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[15] App. xviii

[23] App. xvii

It became an issue after the record was closed.[24] Some evidence concerning FENCO was made a part of this record but appellee did not decide to make this an issue until its amended answer was filed, which was six months after the record was closed. Appellant did not appeal on the Tax Court's determination that FENCO was a partnership instead of a sole proprietorship.

FOSCO purchased air conditioners for its Motel on January 1, 1948, at a cost of $21,777.58. On July 31, 1949, FOSCO transferred said air conditioners to FENCO at book value. The book value was charged to the partners' capital accounts on FOSCO's books.[22] This was a finding on said unpleaded issue. No gain or loss was reported on this transfer. It was reported:

Book costs 1/1/48	$21,777.58
Accrued Depr. Reserve	10,572.49
Book Value 7/31/49	$11,205.09

On September 1, 1949, or 30 days after said transfer, FENCO sold said air conditioners with other assets to Harrison & Chance for $20,000.00 and reported a loss of $6,261.83. FENCO reported the sale:

Equipment	Cost	Depr. Reserve
Furniture & Fixtures	$19,338.40	$5,905.56
Rugs & Drapes	3,300.78	1,443.39
Room Radios	750.78	656.93
Air Conditioners	11,205.09	422.36
	$34,748.19	$8,486.36

[24] R. 23
[22] App. xvii

The book value of the assets was $26,261.83 ($34,748.19 — $8,486.36).

Appellant reported a loss on said sale in his 1949 Federal income tax return.[18] The appellee made no adjustment on said return on said sale.

The adjustment of the rate of depreciation on air conditioners was a pleaded issue. Said adjustment herein, reduced the depreciation reserve on FOSCO's books $6,489.19. It increased the partners net basis on said air conditioners in the same amount. Appellant's net basis was increased $1,297.82 and his loss in 1949 on said sale was increased $1,297.82. Appellee and said Court refused to allow appellant this statutory adjustment on the book value in determining the loss on the sale in 1949.

All the evidence concerning FENCO, in the prior proceeding, was made a part of this record by stipulation of the parties and by an order of the Tax Court.[19] It was also stipulated in the Circuit Court, with approval of said Court, that the Exhibits on this issue could be put in the Appendices of the Briefs and not printed in the official record.[20] Said loss on FENCO's sale was reported in Exhibit "R", introduced on page 145, of certified transcript, Dockets Nos. 54206, 54207 and 54208. See Appendix, page xxiv.

Although issues were raised after the record was closed, which affected this statutory adjustment, and the appellant was not given the opportunity to marshal and

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[18] App. xxiv

[19] App. xxviii-xxix

[20] App. xxi

segregate all the evidence in the record in a trial of the issue raised in the computation, yet said record contains the evidence to support the statutory adjustment of the book value on the asset sold. Appellee filed a motion asking the Tax Court to make a supplemental finding on said issue.[15] The issue was raised by appellant's computation filed July 24, 1957[23] and appellee's "Computation for Entry of a Decision", filed October 17, 1957.

Appellee's computation was filed on October 17, 1957 and on the 18th a hearing was set on the issues raised in the computations for October 21, 1957 at 10:00 o'clock a.m., in Washington, D.C. On October 18th, a Friday, a copy of appellee's computation, upon which judgment was entered, and a notice of the hearing were mailed to appellant's counsel in Oklahoma City, Oklahoma. Said hearing was on October 21, the following Monday.[24]

Said hearing was held before counsel for appellant received the computation which raised the issue to be tried and before counsel received the notice of the hearing. Said computation of appellee which created the issue was not filed five days before said hearing as required under the Tax Court's Rule 50.

Said judgment was entered without giving the appellant an opportunity to be present to present the record and the law on the issue raised by appellee's computation. Said Court's judgment was entered at a hearing in violation of the Tax Court's Rule 50.

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[15] App. xxiii-xxiv

[23] App. xxiv

[24] App. xxxi

In the Appellate Court, the appellee contended that the Tax Court did not pass on the issue. The Circuit Court affirmed the judgment on the appellee's contention.

REASONS FOR GRANTING THE WRIT

The Court of Appeals, Tenth Circuit, has decided important questions of procedure contra to the Federal Rules of Civil Procedure, the Court's rules, and the decrees of other Circuit Courts, in the following particulars:

(a) When said court permitted an untimely amendment to appellee's answer and then, on appeal permitted appellee to enlarge this record on appeal to justify said untimely amendment.

The judgment on the amendment was not the result of a trial under the usual and accepted practice in a judicial proceeding. There was no trial on said issue. There was no evidence offered in this or any other proceeding on said issue. The judgment was entered upon an amendment to the Answer filed six months after the record was closed, after the cause was submitted, and after appellant's brief, on the issues tried, had been filed. The alleged facts, upon which the appellee relied, were known to appellee before the assessment was made.

Under the Tax Court's Rule 17 (d), either party *during the trial* may move to amend the pleading to conform to the proof. Said motion to amend was not filed during the trial, *Pierce Pipe Line Co.* v. *Commissioner*, 30 B.T.A. 470; *Morrisdale Coal Co.* v. *Commissioner* (C.A., 3rd),

97 F.2d 272. There is no proof in this record to support said amendment. . .

Under the Federal Rules of Civil Procedure, Rule 15 (b), an amendment is permissible at any time if the parties consent to or acquiesce in the trial of an unpleaded issue. The issue pleaded in this amendment was not tried. The parties stipulated to the issues to be tried. The parties did not agree to try said issue or acquiesce in the trial of said issue in this or in any other proceeding.

Under the Tax Court's rule, the Federal Rules of Civil Procedure, and the accepted practice in a judicial proceeding, a litigant is entitled to know the fact issues to be tried before the record is closed and the cause submitted. An amendment to conform to the proof is predicated upon the premise that the issue presented by it was litigated by the parties in the proceeding. *Swanson Mfg. Company, et al.* v. *Feinberg-Henry Mfg. Co., et al.* (C.A., 2nd), 147 F.2d 500, 504; *American Fork & Hoe Co.* v. *Stampit Corporation* (C.A., 6th), 125 F.2d 472; *West Amusement Co. Inc.*, 21 T.C. 486; *Simms* v. *Andrews* (C.A., 10th), 118 F.2d 803, 807; *John L. Deming & Co.* v. *Fleming* (C.A., 10th), 160 F.2d 697, Syllabus 4, page 694; *Commissioner I. R.* v. *Erie Forge Company* (C.A., 3rd), 167 F.2d 71; *Cutter* v *Arlington Construction Co.*, 268 Mass. 88, 167 N.E. 266; *Dobson* v. *Clems*, 194 Iowa 1155, 191 N.W. 184.

Such an amendment is improper where the question presented has not been litigated, *Uhl* v. *Phillips Petroleum Company*, 164 Kan. 401, 190 P.2d 349. Such amendment is improper where the facts upon which the amendment is based were known to the movant when his pleading was

filed. *Ligh er* v. *McCord*, 151 S.W.2d 362, Syllabus (7) and (8); 71 C.J.S., Section 285, page 612.

Even if said material evidence had been offered in a trial on the FOSCO issues in this proceeding, said amendment of the pleading to conform to proof would not be authorized merely because evidence, which was competent and material upon issues created by the pleadings, incidentally tends to prove another fact not within the issues in the case, under the decrees of the Tenth Circuit Court and the general rule. *Simms* v. *Andrews, Deputy Collector of Internal Revenue, supra.*

The Appellate Court erred when it permitted appellee to amend this record on appeal to include matters not designated by appellee under said Court's rules and not certified by the Clerk of the Tax Court to be the record in this proceeding. *U. S.* v. *Hosmer*, 76 U.S. 432, 9 Wall 432, 19 L. Ed. 662; *Kearney* v. *Case*, 79 U.S. 275, 20 L. Ed. 395, 396; *Hoskins* v. *Fisher*, 8 Sup. Ct. 834, 125 U.S. 217, 31 L. Ed. 759, 762.

The Appellate Court is bound by the record certified by the Clerk under the Federal Rules of Civil Procedure, Rule 75 (g), 28 U.S.C.A., and has no jurisdiction save to correct errors in the certified record. *Dictograph Prod. Co.* v. *Sanotone Corp.* (C.A., 2nd), 231 F.2d 867; *Petitions of Rudder, et al.* (C.A., 2nd), 159 F.2d 695; *Askins* v. *Overholser* (C.A., D.C.), 170 F.2d 815; *Heath, et al.* v. *Helmick* (C.A., 9th), 173 F.2d 156.

The evidence in the prior trial could not be considered since said evidence was not made a part of this record below. *City of Anchorage, a Corp.* v. *Alaska Dairy Pro.*

Corp., 261 F.2d 873; *In re Chapman Coal Company* (C.A., 7th), 196 F.2d 779.

New matters cannot be incorporated in the record on appeal *Susquehanna Boom Co.* v. *West Branch Co.*, 110 U.S. 57, 28 L. Ed. 69, 3 Sup. Ct. 438; *Hughes* v. *Young*, 58 Ariz. 349, 120 P.2d 396, 138 A.L.R. 943, Syllabus (3) and (4); *Chapman & D. Lumber Co.* v. *St. Francis Levee District*, 234 U.S. 667, 58 L. Ed. 1526, 1527, 34 Sup. Ct. 906.

ARGUMENT

The authorities cited by the Appellate Court are in harmony with the authorities cited herein by the appellant. Said Circuit Court made additional findings in support of said judgment. Said Circuit Court held that the stipulation, made by the parties, that the Tax Court's determination on the FOSCO issues, in the first partner's trial, would be binding on all the partners in the trial of their separate appeals, was ambiguous. That said stipulation made all the evidence in the prior trial, as well as the findings, a part of this record for any purpose.

In the prior trial, the issue was whether the $9,500.00 and $1,995.00 checks were allowable contract costs to FOSCO. These checks were endorsed by the subcontractor and the funds deposited in appellant's personal bank account. The Tax Court, in the prior trial, held that these checks were allowable contract costs to FOSCO, finding that "such exchanges of money between the two men may be explained in other ways." There was evidence of advances and payments of money by the appellant to the subcontractor. Said Appellate Court, after holding that

the findings, made by the Tax Court in the prior proceeding, were binding upon the parties, proceeded to ignore said finding that there were exchanges of money between the appellant and the subcontractor.

The Tax Court held that the appellee had the burden of proof on this issue. Then the Court held that the appellant failed to prove that these exchanges of money were not taxable income to him. However, this was not the issue upon which the evidence was offered in the prior proceeding. The Government offered no evidence on the issue that these exchanges of money resulted in income, taxable to the appellant. The mere contention in the motion constituted proof which the sworn testimony of the appellant could not overcome.

The finding that the checks were taxable income to this appellant is contrary to the evidence which was made a part of this record by the order of the Appellate Court and contrary to the finding made by the Tax Court, in said prior proceeding, that these were "exchanges of money" between appellant and the subcontractor.

Said Court's finding not only did violence to the finding made in the prior trial but it also did violence to the stipulation made by the parties, and the rulings of the Tax Court in the trial. Appellant and the other FOSCO partners did not want to try the personal issues, in their separate appeals, in one large record which would prove costly in the event of an appeal. Upon this objection, the Tax Court granted separate trials and records. When this appellant's appeal was called for trial, appellee asked if the evidence in the prior trial could be referred to and con-

sidered on the issues to be tried in this proceeding. The Tax Court ruled that it could not be considered, that the Court had granted separate trials. That if appellee relied on evidence offered in the prior trial, regardless as to how similar, it had to be offered herein to be considered. Based on this ruling, the parties agreed and the Tax Court ordered that all the evidence on the unpleaded FENCO issue, offered in the prior trial, be made a part of this record. Thus giving effect to the parties' stipulation as to the issues to be tried and the Tax Court's ruling as to the evidence to be considered.

The Tax Court, in the same motion to amend the answer, permitted the appellee to make the FENCO issue one of the issues in this proceeding. Said amendment on the FENCO issue, and the judgment thereon, was not appealed since the appellant was advised concerning the possibility of such an amendment during the trial and there is at least some evidence, which was made a part of this record, on said issue.

Said Appellate Court's holding that the stipulation, made by the parties, was ambiguous and made all the evidence in the prior trial a part of this record for any purpose, does violence to the Tax Court's ruling permitting and ordering separate trials to prevent hardship in the event of appeals. Said holding also does violence to the ruling of the Tax Court that evidence offered in the prior trial had to be offered in this record to be considered on the issues to be tried in this proceeding. It also does violence to the stipulation of the parties as to the issues to be tried in this proceeding.

The conduct of the Tax Court, and the parties in the trial, shows there was no misunderstanding as to the meaning of said stipulation. Said stipulation is not ambiguous as held by the Appellate Court.

The Appellate Court held that appellee was making protective appeals on the judgments on the other taxpayers' petitions to protect revenue. One cannot appeal unless aggrieved. To perfect an appeal, one must make a record on the issues to be appealed and upon which appellant seeks a review. Appellee made no record to appeal. A reversal of the judgment on the issues in apellant's appeal could not affect the taxable income of any of the taxpayers whose petitions were "protectively appealed" by the appellee. If said reversal would affect the taxable income in said other proceedings, appellee is protected under the mitigation statutes, Sections 1311-1315, Internal Revenue Code 1954. The purpose of the protective appeals was to get the evidence in the prior proceedings on another issue made a part of this record in the Appellate Court to support the untimely amendment to the answer. Could any other litigant, except the Government, indulge in such a maneuver and be so successfully rewarded in said Appellate Court?

Said Appellate Court permitted appellee to file a supplemental record, not designated in this proceeding as a part of the record on appeal, as provided in said Court's rules, and not certified as a part of this record by the Clerk of the Tax Court. Said order successfully made all the evidence, in the prior trial, a part of this record for any purpose, contrary to the Federal Rules of Civil Procedure, the rulings of the Tax Court, and the stipulations of the parties.

After the Appellate Court made the evidence in the prior trial a part of this record, it considered said evidence only in justifying the untimely amendment to the answer and then denied the appellant a fair trial on said issue. The Tax Court held that appellee had the burden of proof on said issue. Then said Court held that the appellant did not disprove that said checks were taxable income to him. Said Court entered a judgment on the appellee's contention without evidence and in disregard of said evidence, made a part of the record on appeal, and the finding of fact made in the prior proceeding, which was binding on appellee.

(b) When said court denied appellant a hearing on a statutory adjustment in the computation of the judgment under Tax Court's Rule 50.

This issue was raised in the computations under Tax Court's Rule 50. The counter computation of appellee filed on October 17, 1956, raised the issue. The Circuit Court held that appellant was not entitled to a hearing on the issue.

Wherefore it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Court of Appeals, Tenth Circuit, should be issued and said judgment should be reversed.

Respectfully submitted.

C. E. RAM MORRISON,
519 Braniff Building,
Oklahoma City, Oklahoma,
Counsel for Petitioner.

August, 1959.

APPENDIX

APPENDIX A

Memorandum Opinion
T. C. Memo. 1957-15

Jacqueline Finley O'Shea, et al., Petitioners,[1] v. Commissioner of Internal Revenue, Respondent.

Filed January 28, 1957

Memorandum Opinion

Mulroney, Judge: Respondent determined deficiencies in income tax and additions to the tax as follows:

Docket Number	*Petitioner*	*Year*	*Deficiency*	*Addition to Tax Sec. 293 (b)*
54199	Jacqueline Finley O'Shea	1946	$ 630.57	$ —
		1947	5,281.13	—
54200	Dan M. O'Shea	1946	573.21	—
		1947	5,338.13	—
54201	Dan M. O'Shea and Jacqueline Finley O'Shea	1948	1,275.38	—
54202	Robert Wesley Finley			

[1] The following proceedings are consolidated herewith: Dan M. O'Shea, Docket No. 54200; Dan M. O'Shea and Jacqueline Finley O'Shea, Docket No. 54201; Robert Wesley Finley, Docket No. 54202; Harry L. Berry, Docket No. 54203; Irene Dick Berry, Docket No. 54204; Harry L. Berry and Irene Dick Berry, Docket No. 54205; and Dick L. Berry, Docket No. 54209.

[APPENDIX]

Determination per statutory notice of deficiency:

		1946	34,591.60	15,394.20
		1947	74,076.93	35,558.62
		1948	371.00	0.
		1949	1,480.27	0.

Redetermination per amendment to answer:

		1948	3,272.67	—
54203	Harry L. Berry	1946	741.64	—
		1947	4,936.54	—
54204	Irene Dick Berry	1946	741.64	—
		1947	4,986.54	—
54205	Harry L. Berry and Irene Dick Berry	1948	1,307.55	—
54209	Dick L. Berry	1946	4,327.55	—
		1947	19,233.17	—
		1948	2,958.84	—

The Issues presented are as follows:

1. Were Harry L. Berry, Dick L. Berry and Charles A. Liming partners in the Finley-O'Shea Construction Company during any of the fiscal years ending July 31, 1946 through 1950?

2. Alternatively, were certain deductions for salaries paid by the Finley-O'Shea Construction Company to Harry L. Berry and Dick L. Berry in the fiscal years ending July 31, 1946, 1947 and 1948 properly allowed?

3. Was a portion of the distributable income from the Finley-O'Shea Construction Company charged to Dan M. O'Shea and R. W. Finley properly includible in the income of R. E. L. Finley and Jerline Dick Finley?

4. Were certain payments by the Finley-O'Shea Construction Company to Charles A. Liming in the fiscal year ending July 31, 1947 for alleged engineering services properly disallowed?

5. Were the amounts of $9,500, $47,203.26 and $514 deducted by the Finley-O'Shea Construction Company in the fiscal years ending July 31, 1946, 1947 and 1948 as subcontract expenses properly disallowed?

6. Were certain alleged job cost deductions by the Finley-O'Shea Construction Company of $2,306.25 and $1,125 in the fiscal year ending July 31, 1946 properly disallowed?

7. Were certain unsubstantiated travel expense deductions by Finley-O'Shea Construction Company of $1,020 and $650 in the fiscal years ending July 31, 1946 and 1947 properly disallowed?

8. Was an expense deduction of $765 by the Finley-O'Shea Construction Company in the fiscal year ending July 31, 1947 properly disallowed?

9. Were certain deductions by the Finley-O'Shea Construction Company in the fiscal years ending July 31, 1947 and 1948 in the amounts of $1,375 and $255 properly disallowed?

10. Were certain unsubstantiated travel, entertainment and automobile expenses deducted by R. W. Finley, Dan M. and Jacqueline Finley O'Shea, Harry L. and Irene Dick Berry and Dick L. Berry in 1946, 1947 and 1948 properly disallowed?

11. Were the amounts of $9,500 and $1,995, allegedly returned by the subcontractor Roy "Tex" Baughman to R. W. Finley in 1946 and 1947, properly includible in the income of R. W. Finley for those years?

[APPENDIX]

12. Were certain deductions claimed in 1948 by the Rail Fence Operating Company for alleged purchases of supplies properly disallowed?

13. Were the losses sustained by the Rail Fence Operating Company in the years 1947 and 1948 deductible in their entirety by R. W. Finley?

14. Were the 1946, 1947 and 1948 losses claimed by Harry L. and Irene Dick Berry in connection with the operation of a farm at Arcadia, Oklahoma, properly disallowed?

15. Was any part of the deficiencies determined by the respondent in the income tax of R. W. Finley for the years 1946 and 1947 due to fraud with intent to evade tax?

It has been agreed by the parties that the determination of this Court in R. E. L. Finley, T. C. Memo. 1957-16, filed under this same date, with respect to the issues involving the Finley-O'Shea Construction Company and the operation of the Rail Fence motel will be determinative of the related issues in these consolidated proceedings. We incorporate by this reference the relevant findings of fact and determinations in the related case, R. E. L. Finley, *supra*. Still remaining for our consideration are issues 10, 11, 12, 13, 14, and 15.

Respondent, by amendment to his pleadings, claims in Docket No. 54202, that the amounts of $9,500 and $1,995 were includible in the income of R. W. Finley for those years. The burden of proof on this issue was on respondent. The respondent showed that these amounts represent payments made by the Finley-O'Shea Construction Company in those years to its subcontractor, Roy "Tex" Baughman, as alleged subcontract costs. The respondent showed and we found in R. E. L. Finley, *supra*, that these amounts were returned by Baughman to R. W. Finley in those years and deposited by R. W. Finley in his own checking and bank accounts. R. W. Finley explains the

$9,500 payment as a part of an arrangement whereby Baughman advanced money for the purchase of certain Government surplus equipment under R. W. Finley's veterans' preference. It is admitted by R. W. Finley that no such surplus equipment was ever purchased. We are convinced the respondent met his burden on this issue. We hold that the amounts of $9,500 and $1,995 were properly includible in the income of R. W. Finley for the year 1946 and 1947, respectively.

Respondent argues that a part of the deficiencies determined by him in the income of R. W. Finley for the years 1946 and 1947 was due to fraud with intent to evade tax. Respondent must prove fraud by evidence that is clear and convincing. *Arlette Coat Co.*, 14 T. C. 751. Respondent lays great stress on the fact that R. W. Finley did not report in his income for 1946 and 1947 the payments received by him in those years from Baughman in the amounts of $9,500 and $1,995. Respondent has the burden of proving fraud with evidence that is clear and convincing and we cannot say that he has done so. The difference in the burden of proving as to the two issues consequently results in our sustaining the respondent in including the disputed amounts in R. W. Finley's income and in holding against the respondent on the fraud issue.

Another issue concerns the proper allocation of the losses from the operation of the Rail Fence Operating Company during the years ended December 31, 1947 and 1948. Respondent argues that the Rail Fence, a motel, was operated by FOSCO as a partnership asset and that consequently the losses are properly allocable to the FOSCO partners. R. W. Finley claimed the entire losses for both years. We agree with the respondent. The investment in the Rail Fence, amounting to more than $200,000, was recorded on the FOSCO books and the various partners in FOSCO participated in the operation and in the financing of the Rail Fence. We are convinced from the evidence and

from the implications in the conduct of the FOSCO partners that the Rail Fence was operated by FOSCO as a partnership asset and that the losses for the years 1947 and 1948 should be allocated accordingly.

Respondent disallowed the amount of $5,243.85 claimed by the Rail Fence Operating Company for meat supplies purchased by it. There was testimony to the effect that R. E. L. Finley purchased all the meat used in the operation of the Rail Fence. It was the practice for the Rail Fence Operating Company to issue checks to R. E. L. Finley, who personally made the meat purchases. Respondent, in his brief, argues that 20 of the 24 checks payable to R. E. L. Finley were for "round amounts"; that the invoices do not substantiate the 28 disputed checks because of the discrepancy between the amounts of $5,243.85, which is the total amount of the checks, and $5,368.31, the total amount of the invoices; and that only 10 of the checks, amounting to $2,941.38, payable to R. E. L. Finley and cashed, contained the endorsements of a vendor from whom meat was allegedly purchased. We have examined the evidence before us and find as a fact that the entire amount of payments claimed by the Rail Fence Operating Company for meat purchases was valid. We are not persuaded that the minor discrepancy, emphasized by the respondent, or the fact that only a portion of the disputed checks were endorsed by a vendor of meat, indicate otherwise.

Harry L. and Irene Dick Berry claimed losses in 1946, 1947 and 1948 in connection with the operation of a farm at Arcadia, Oklahoma. The Commissioner disallowed them. There is no indication that this farm was operated as a trade or business, or for profit, in those years. Respondent argues that these losses were properly disallowed under section 24(a)(1) of the 1939 Internal Revenue Code, which prohibits the deduction of any portion of the expenses of a taxpayer which are personal expenses. We sustain the respondent in his disallowance of these losses.

Respondent disallowed one-half of the automobile expenses claimed by R. W. Finley in the years 1946, 1947 and 1948. No evidence is offered to overcome the presumption of correctness in respondent's determination, and we sustain the respondent. R. W. Finley also claimed deductions for travel and entertainment expenses amounting to $2,600 in 1946, $4,800 in 1947, and $1,390 in 1948. These deductions were disallowed by the respondent in full. These deductions are not substantiated in any manner except for general testimony to the effect that estimates were made each year of the expenses so incurred. R. W. Finley, it is clear, was active during these years in the affairs of the Finley-O'Shea Construction Company and the Rail Fence Operating Company, and we are convinced that he did incur some expenses for travel and entertainment. Using our best judgment, we find, and so hold, that R. W. Finley is entitled to deductions under section 23(a) of the Internal Revenue Code of 1939 for travel and entertainment expenses in the amounts of $750 for 1946, $1,250 in 1947 and $500 in 1948. *Frederick S. Klein*, 25 T. C. 1045; *Cohan* v. *Commissioner*, 39 F. 2d 540.

Harry L. and Irene Dick Berry claimed deductions of $1,200 in 1946, $3,346.96 in 1947 and $1,833.09 in 1948 for travel, entertainment, automobile depreciation and operating expenses allegedly sustained by Harry L. Berry in connection with the Finley-O'Shea Construction Company and his independent operations. Respondent disallowed these deductions. No substantiation is offered for these amounts by Harry L. Berry or his wife. They merely made estimates covering their expenses over these years. We are persuaded that a portion of these expenses was actually incurred by Harry L. Berry in connection with his business operations for those years and, using our best judgment, we find, and so hold, that Harry L. and Irene Dick Berry are entitled to deductions of $650 in 1946, $1000 in 1947 and $750 in 1948. The disallowance of the remain-

ing portions of these deductions for these years by the respondent is sustained. *Cohan* v. *Commissioner, supra.*

Dick L. Berry claimed deductions for travel, entertainment and automobile expenses of $1,914.30 in 1946, $4,800 in 1947 and $1,390 in 1948. These expenses were disallowed in their entirety by the respondent. Dick L. Berry alleges that he sustained these expenses in connection with the activities and operations of the Finley-O'Shea Construction Company. These expenditures are not substantiated and are, at best, mere estimates of expenditures incurred. We find, and so hold, that Dick L. Berry is entitled to deductions for travel, entertainment and automobile expenses of $750 in 1946, $1,250 in 1947 and $500 in 1948. *Cohan* v. *Commissioner, supra.*

Dan M. and Jacqueline Finley O'Shea claimed deductions for travel, entertainment, automobile and other expenses, allegedly sustained by Dan M. O'Shea in connection with the Finley-O'Shea Construction Company, of $674.50 in 1946, $5,341.02 in 1947 and $2,051.32 in 1948. These expenditures were disallowed in full by the respondent. Again, we have no evidence which will substantiate these expenses which are, at best, merely estimates. There is testimony that Dan M. O'Shea made a trip to the west coast in 1947. He testified that at the time of the trip "we were in the process of building the Rail Fence, and I took a trip from here (Oklahoma City) to Denver, Salt Lake City, Sacramento, San Francisco, and down the west coast to Lower California, and back on 66 to Oklahoma City" for the purpose of "Investigating and checking various types—good, bad, and indifferent—of tourist hotels, motor courts; checking on the type of management and operation." We are not persuaded that this particular trip taken by Dan M. O'Shea was taken entirely for business reasons. Using our best judgment, we find, and so hold, that Dan M. and Jacqueline Finley O'Shea are entitled to deductions for travel, entertain-

ment, automobile and other expenses of $250 in 1946, $750 in 1947 and $500 in 1948. *Cohan* v. *Commissioner*, *supra*.

Respondent made a motion prior to the conclusion of the trial to file an amended answer to conform to the proof in Docket No. 54202. We granted this motion. Rule 17(d) of the Rules of Practice of the Tax Court. Petitioner R. W. Finley objected to such motion and renewed such objection in his brief. There is no merit in petitioner's objection. The motion was properly made during the course of the trial by the respondent.

Decisions will be entered under Rule 50.

Decision, No. 54202

Pursuant to the Court's Memorandum Opinion filed January 28, 1957, the petitioner, on July 16, 1957, filed his proposed computation of tax, and respondent, on October 17, 1957, filed his proposed computation. Hearing was had thereon on October 21, 1957, and the respondent's computation appearing to be in accordance with the opinion of this Court, it is

Ordered and Decided: That there are deficiencies in income tax and additions to the tax for the taxable years 1946 through 1949, as follows:

Year	Deficiency	Addition to Tax Sec. 293(b)
1946	$11,468.23	None
1947	18,073.15	None
1948	1,024.46	—
1949	None	—

John E. Mulroney,
Judge.

Entered November 8, 1957

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APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, APRIL 9, 1959:

PICKETT, Circuit Judge:

These proceedings are here on petitions to review decisions of the Tax Court relating to the members of an Oklahoma family partnership referred to as "FOSCO"[1]. 5901 involves income tax deficiencies of Robert Wesley Finley[2] for the years 1946, 1947, 1948 and 1949. The remaining petitions were filed by the Commissioner to protect the revenue, and are to be considered only in case of a reversal in 5901. The parties agreed in the Tax Court that the several petitions for redetermination would be presented in two consolidated hearings, the first to include the cases here numbered 5874, 5876 and 5878, concerning deficiencies of R. E. L. Finley and his wife, Jerline Dick Finley, for the years 1946 to 1950, inclusive. The remaining cases, including that of the taxpayer, were tried together immediately after this first hearing. It was stipulated that all matters relating to FOSCO would be tried in the first consolidated proceeding, and that the Tax Court's determination in that proceeding, with respect to such issues, would be binding on all the taxpayers.

The taxpayer contends that the Tax Court erred (1) in permitting the Commissioner to file, after the record was closed, an amended answer based on evidence offered

[1] During the years in question, FOSCO was engaged in the general construction business and contracted for the construction of public projects. A considerable amount of the construction contracted for was completed by subcontractors.

[2] Hereinafter referred to as "taxpayer."

only in the first hearing, and (2) in disallowing a deduction for a loss incurred from an alleged sale of personal property.

In determining the tax deficiencies of the various partners, the Commissioner disallowed items totalling $57,217.26, which were claimed to be FOSCO subcontract expenses for the years 1946, 1947 and 1948.[3] The basis for this disallowance was that it had not been shown that the payments were for work performed by a subcontractor and that the entire amount had been returned to the partnership or to its partners. In attempting to justify the deduction of these expenditures, the taxpayer was called as a witness in the first consolidated proceeding and testified that during the 1946 the partnership issued its check in the amount of $9,500 payable to a subcontractor, Baughman, who endorsed the check and returned it to the taxpayer, who then deposited it in his personal bank account. He also testified that a similar transaction occurred in 1947 involving a check for $1,995. In his testimony the taxpayer claimed that the proceeds of these checks did not belong to him, and gave various explanations for the deposits. These amounts were not reported as part of his income for the years in question. Neither the Commissioner's notice of deficiency nor his answer to the taxpayer's petition for redetermination claimed these items to be income to the taxpayer. Evidence of the two transactions was not re-offered in the trial of the taxpayer's case.

With respect to the taxpayer's petition, the Commissioner, at the close of the second consolidated proceeding, requested permission to file an amended answer to conform the pleadings to the proof. This request was granted without a showing as to what the amendment

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[3] This amount was paid to subcontractor Baughman by checks issued over a period of time without the customary invoices to support them.

would be. Several months thereafter, and prior to a decision in the case, the Commissioner filed an amended answer alleging that the two aforesaid items should be treated as income to the taxpayer. Relying upon the evidence and findings in the first case, the Tax Court upheld the Commissioner's contention.

Although not resisting the Tax Court's conclusion on its merits, the taxpayer contends that there is no evidence in the record of Number 5901 to sustain it. He urges that the stipulation between the parties did not authorize the Tax Court to treat testimony heard during the preceding trial as if it were reintroduced in the second hearing; that such testimony was never made a part of the record in his case; and furthermore, that the question of whether the two items were income to the taxpayer was never in issue.

In its decision on the taxpayer's petition, the Tax Court referred to the stipulation of the parties wherein it was agreed that a determination in the first case of all issues concerning FOSCO would be determinative of related issues in the other cases. It specifically incorporated by reference the relevant finding into the record of this case.[4] One of the issues in the first case was whether cer-

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[4] In this connection, the Tax Court said:

"It has been agreed by the parties that the determination of this Court in R. E. L. Finley, T. C. Memo. 1957-16, filed under this same date, with respect to the issues involving the Finley-O'Shea Construction Company and the operation of the Rail Fence motel will be determinative of the related issues in these consolidated proceedings. We incorporate by this reference the relevant findings of fact and determinations in the related case, R. E. L. Finley, *supra*. Still remaining for our consideration are issues 10, 11, 12, 13, 14 and 15.

"Respondent, by amendment to his pleadings, claims in Docket No. 54202, that the amounts of $9,500 and $1,995 were includible in the income of R. W. Finley for those years. The burden of proof on this issue was on respondent. The respondent showed

tain payments by FOSCO to subcontractor Baughman were for work performed, and whether these payments, or any of them, were returned to the partners. Taxpayer's testimony was in support of the allowance of these payments as deductible business expense of FOSCO and also disclosed that some of the payments found their way into his bank account. In the first trial the Tax Court found that the payments by FOSCO were partnership business expense and that their deduction should have been allowed. It also found that the $9,500 and $1,995 payments were returned to the taxpayer and deposited by him in his personal bank account. These findings were related to the business of FOSCO and, under the terms of the stipulation, bound the taxpayer. We see no reason why the Tax Court could not refer to the evidence upon which they were based. Just what the parties intended in the stipulation with reference to the findings is somewhat ambiguous. In such cases there will be no interference with the Tax Court's understanding of the stipulation. *Clason* v. *Matko*, 223 U. S. 646, 652; *L. A. Wood & Co.* v. *Taylor*, 5 Cir., 154 F.2d 548, 550. It appears that the purpose of having two trials was to reduce the size of the record in case all of the taxpayers did not desire to appeal. There is no indication that there was any reason why the Tax Court should have been required to hear the same evidence in succe-

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[4] (Continued)

that these amounts represent payments made by the Finley-O'Shea Construction Company in those years to its subcontractor, Roy 'Tex' Baughman, as alleged subcontract costs. The respondent showed and we found in *R. E. L. Finley, supra,* that these amounts were returned by Baughman to R. W. Finley in those years and deposited by R. W. Finley in his own checking and bank accounts. R. W. Finley explains the $9,500 payment as a part of an arrangement whereby Baughman advanced money for the purchase of certain Government surplus equipment under R. W. Finley's veterans' preference. It is admitted by R. W. Finley that no such surplus equipment was ever purchased. We are convinced the respondent met his burden on this issue. We hold that the amounts of $9,500 and $1,995 were properly includible in the income of R. W. Finley for the year 1946 and 1947, respectively."

sive trials, or that the parties intended that it should. The most that can be said is that a formal motion to have the evidence included in the second record would have prevented any misunderstanding.

The taxpayer next questions the timeliness of the filing of the amended answer by the Commissioner. Section 272(e) of the Internal Revenue Code of 1939, (Sec. 6214 of the 1954 Code), confers jurisdiction upon the Tax Court to redetermine the correct amount of a taxpayer's deficiency and, in addition, it may increase the deficiency if the claim therefor is asserted at or before the hearing. Tax Court Rule 17(d) provides:

> "The Court may at any time during the course of the trial on the merits grant a motion of either party to amend its pleadings to conform to the proof in particulars stated at the time by the moving party. The amendment or amended pleadings thus permitted, shall be filed with the Court at the hearing or shall be filed in the office of the Clerk of the Court in Washington, D. C., within such time as the Court may fix."

Although the amended answer was not filed for several months after the taking of testimony had been concluded, it was filed prior to a decision by the Tax Court. Under the aforesaid statute and rule, we think the claim may be made and the amendment filed any time before a final decision. *Henningsen* v. *C.I.R.*, 4 Cir., 243 F. 2d 954; *C.I.R.* v. *Ray*, 7 Cir., 88 F. 2d 891, *cert denied* 301 U. S. 711; *Helvering* v. *Edison Securities Corp.*, 4 Cir., 78 F.2d 85; *International Banding Mach. Co.* v. *C.I.R.*, 2 Cir., 37 F.2d 660.

In the interest of justice, the trend of court decisions is for a liberal construction of rules authorizing the amendment of pleadings. Ordinarily, under the Federal Rules of Civil Procedure, when evidence creating new issues is re-

ceived without objection, the pleadings may be considered to have been amended to include the issues even without formal motion. Rule 15(b), Fed. Rules Civ. Proc.; *Decker* v. *Korth*, 10 Cir., 219 F.2d 732, *cert. denied* 350 U. S. 830; *Underwriters Salvage Co.* v. *Davis & Shaw Furniture Co.*, 10 Cir., 198 F.2d 450. See *Denver & Rio Grande Western R. Co.* v. *Himonas*, 10 Cir., 190 F.2d 1012, 1016. We think the Tax Court's Rule 17(d) should likewise be liberally construed to effect its purpose. See *C.I.R.* v. *Rau*, *supra*.

Finally, the taxpayer contends that the Tax Court erroneously denied him a deduction for his full partnership share of a loss resulting from the sale of airconditioning equipment owned by the partnership.[5] The Commissioner determined that an excessive amount of depreciation on this equipment had been claimed by FOSCO. The parties, in their briefs, stated that they agreed on the amount by which the depreciation allowance would be reduced. The taxpayer urges that this agreement effected an increase in the book value of the equipment and that therefore the recognized loss on its sale should have been increased correspondingly. If this is true, the taxpayer may have been entitled to a loss adjustment, but the record contains no information as to the sale and there is no indication that the Tax Court ever considered the question. Only under exceptional circumstances, which do not exist here, will the Court of Appeals consider a matter not presented to the Tax Court. *Helvering* v. *Salvage*, 297 U. S. 106; *General Utilities & Operating Co.* v. *Helvering*, 296 U. S. 200; *Nicholson* v. *C.I.R.*, 10 Cir., 218 F.2d 240; *Hotel Kingkade* v. *C.I.R.*, 10 Cir., 180 F.2d 310.

AFFIRMED.

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[5] FOSCO constructed a motel and it was operated under the name "Rail Fence Motel" and referred to in the record as "FENCO". The air conditioning equipment referred to was purchased by FOSCO and installed in the motel.

T. C. Memo. 1957-16

R. E. L. Finley et al. v. Commissioner
Dockets 54206, 54207 and 54208.

"The issues in these consolidated dockets are: * * *

"3. Whether certain payments by the Finley-O'Shea Construction Company designated in amounts of $9500, $47,203.26 and $514 in fiscal years ended July 31, 1946, 1947, and 1948, respectively, as subcontract expenses were properly disallowed:

* * * * * * * * *

"Respondent disallowed deductions claimed by FOSCO in the amounts of $9,500, $47,203.26 and $514 for the fiscal years ended July 31, 1947, 1948 and 1949, respectively. These payments, designated as subcontract costs on FOSCO's books, were disallowed on the grounds that (a) they were not substantiated and (b) such payments were, in fact, returned to FOSCO, or to FOSCO's partners, by Roy 'tex' Baughman, the subcontractor. It is true there is evidence tending to show that in the fiscal year 1946 the amount of $9,500 was repaid by Baughman to R. W. Finley, one of FOSCO's partners, and that in the fiscal year 1947 the amount of $1,995 was also returned by Baughman to R. W. Finley. However, these two payments do not necessarily imply that Baughman did not actually do the work represented by such payments. It is not quite clear why the respondent disallows the amount of $9,500 in FOSCO's fiscal year 1947 in the face of the fact that such check is dated June 6, 1946. However that may be, such exchanges of money between the two men may be explained in other ways. We are satisfied that these amounts, $9,500 in the fiscal year 1946, and $1,995 in fiscal year 1947, as well as the remaining payments disallowed by the respondent in the fiscal years 1947, 1948 and 1949 were valid pay-

ments by FOSCO for those years to its subcontractor and may be deducted.

* * * * * * * * *

"The original cost of the real estate and the building and fixtures composing the Rail Fence was paid by FOSCO, and FOSCO made expenditures for FENCO during FOSCO's fiscal years ended July 31, 1948, 1949. The FENCO expenditures and withdrawals from FOSCO were treated on the FOSCO books as charges against the capital accounts of the FOSCO partners.

* * * * * * * * *

"The Rail Fence, a tourist motel in Oklahoma City, Oklahoma, was operated by the Rail Fence Operating Company, a partnership, hereinafter called FENCO. FENCO began operations in the fall of 1947. Its books were kept on a calendar year basis. FENCO had the same partners as FOSCO, and the partners in FENCO had the same partnership interest in FENCO's profits and losses as they had as partners in FOSCO. The land on which the Rail Fence was situated was acquired on February 3, 1947, with title held by Robert W. Finley in trust and for the benefit and use of FOSCO. The original cost of the real estate and the building and fixtures comprising the Rail Fence was paid by FOSCO, and FOSCO made expenditures for FENCO during FOSCO's fiscal years ended July 31, 1948 and 1949. The FENCO expenditures and withdrawals from FOSCO were treated on the FOSCO books as charges against the capital accounts of the FOSCO partners. No formal partnership agreement was ever prepared to cover FENCO's operations * * *."

[APPENDIX]

MOTION OF THE COMMISSIONER FOR PRINTING OF SUPPLEMENTAL RECORD.

The Commissioner of Internal Revenue, through his counsel, respectfully moves this court for permission to file an amended designation for printing of certain items contained in the records of the following dockets of this Court, Nos. 5874, 5876 and 5878 (Tax Courts Nos. 54206 to 54208) and that the printed record be considered as a supplemental record in Docket No. 5901 in this Court (Tax Court No. 54202).

The reasons for this motion are as follows:

1. Dockets Nos. 5874, 5876, 5878, 5882 to 5888 and 5901 (Tax Court Nos. 54199 to 54209) involve related parties and related issues. All of these dockets relate to the operation of two partnerships, the Finley-O'Shea Construction Company and the Rail Fence Operating Company. All of these dockets relate to taxpayers who were partners of both partnerships.

2. When all of these proceedings were being tried before the Tax Court and when the Tax Court rendered its memorandum opinions in these proceedings, it was determined that the issues relating to the Finley-O'Shea Construction Company and the Rail Fence Operating Company, which were tried in Docket Nos. 5874, 5876, and 5878 (Tax Court Nos. 54206 to 54208) would be made a part of the record of Docket Nos. 5882 to 5888 and 5901 (Tax Court Nos. 54199 to 54205 and 54209), and that the Tax Court's determination as to these issues in Docket Nos. 5874, 5876, and 5878 (Tax Court Nos. 54206 to 54208) would be determinative of the related issues in Docket Nos. 5882 to 5888 and 5901 (Tax Court Nos. 54199 to 54205 and 54209). (See pages 67 and 68 of the printed record in *Finley* v. *Commissioner*, decided April 23, 1958, C.A. 10th. Nos. 5734 and 5735: transcript of hearing of proceedings before the Tax Court of February 21, 1956, pages 8 through 10, Docket Nos. 5882 to 5888 and 5901 (Tax Court Nos.

54199 to 54205 and 54209); and Tax Court Memorandum Opinion 1957-15, decided January 28, 1957, pages 4 and 5, in Docket Nos. 5882 to 5888 and 5901 (Tax Court Nos. 54199 to 54205 and 54209).

3. Both of the issues involved in the petition to review of Robert Wesley Finley in Docket No. 5901 (Tax Court No. 54202) relate to the operations of the Finley O'Shea Construction Company and to the Rail Fence Operating Company. All of the testimony and exhibits relating to one of these issues, whether $9,500 and $1,995 should be included in the income of Robert Wesley Finley for the respective years of 1946 and 1947, was introduced during the proceedings in Docket Nos. 5874 to 5878 (Tax Court Nos. 54206 to 54208). If the petitions to review of R. W. L. Finley and Jerline Dick Finley in Docket Nos. 5875 and 5877 (Tax Court Nos. 54206 and 54207) are dismissed, this evidence would no longer be included in a printed record on appeal. Accordingly, we submit that it would be more convenient to this Court and to counsel for the respective parties to have the important parts of the evidence relating to this issue and upon which counsel will rely made available for ready reference by printing such material in a supplemental record to Docket No. 5901 (Tax Court No. 54202). Such a procedure would obviate the necessity to refer to and examine the large mass of original papers.

4. All of the items set forth in the amended designation for printing in Docket Nos. 5874, 5876, and 5878 (Tax Court Nos. 54206 to 54208) were previously included (along with other items which no longer must be printed) in the original designation for printing made by counsel for the respective parties for Docket Nos. 5874 to 5878 (Tax Court Nos. 54206 to 54208).

WHEREFORE, it is respectfully requested that the above motion be granted by this Court.

August 22, 1958.

OBJECTION TO MOTION OF COMMISSIONER TO ENLARGE ON THE RECORD IN THIS CAUSE.

Comes now the appellant and objects to the appellee's proposal to enlarge on the record made at the trial in this cause by including evidence from other records made on the appeals of other taxpayers in The Tax Court.

This appellant wishes to inform this Court that the attorney for the Commissioner is trying to mislead the Court in the motion filed herein.

The following stipulations and understandings were had in the Tax Court, towit:

(1) In the trial docket Nos. 5874 or 5875, 5876 or 5877 and 5878 (Tax Court Nos. 54206 to 54208), it was stipulated that the Tax Court's determination of the partners, and their distributable shares in the net income of Finley-O'Shea Construction Company would be binding on all partners in the trial of their separate appeals then pending before The Tax Court in Docket Nos. 54199 to 54205 and 54209.

(2) It was further agreed that The Tax Court's determination of the partners, and their distributable shares in the net income of Rail Fence Operating Company would be binding on all the partners in the trial of their separate appeals then pending before the Tax Court.

(3) In Docket Nos. 5882 to 5888 and 5901 (Tax Court Nos. 54199 to 54205 and 54209), it was agreed that the record had to be made on all other issues regardless to the similarity of the evidence to the evidence offered in the record of the trial just concluded in Docket Nos. 5874 or 5875, 5876 and 5888 (Tax Court Nos. 54206, 54207 and 54208). See Record February 21, 1956, pages 5, 6, and 7.

That regardless to the representations made by appellee's counsel in said motion, appellant's appeal to this Court does not involve the determination of the issues involved in paragraph (1) and (2) above. All the issues involved in appellant's appeal are personal to appellant's income tax liability and do not effect the appeals of other taxpayers.

August 28, 1958.

STIPULATION TO OMIT MATERIAL FROM THE PRINTED RECORD

It is hereby stipulated by counsel for the respective parties herein that, subject to the approval of the Court, the following items which previously were designated for inclusion in the printed record in the above-entitled dockets should be deleted from the designations and omitted from the printed record:

1. Docket entries, service and return of service for hearing of October 21, 1957, for docket No. 5901 (T.C. No. 54202).
2. Exhibits B and C attached to Petition in Docket No. 5901.
3. All computations for Entry of Decision filed by Taxpayer and by the Commissioner in Docket No. 5901.
4. Memorandum in support of Respondent's Rule 50 Computation in Docket No. 5901.
5. Order setting hearing for October 21, 1957 and copy of service in Docket No. 5901.
6. Transcript of Testimony of February 21, 1956, from page 3, line 1 through line 13; from page 3, line 20 through page 6, line 14; from page 10, line 23 through page 22, line 9; from page 23, line 17 through page 45, line 19.

It is further stipulated that counsel for any of the parties may refer in his briefs or an oral argument to any unprinted material, including any exhibits, in the records of either dockets Nos. 5874-5878 or 5882-5888, 5901, and may reproduce any such material either as an appendix to his briefs or separately and serve and file copies upon opposing counsel and the Court, and the Court may refer to such material with the same force and effect as if it had been included in the printed record.

Appellant's designation of parts of the record to be printed, nos. 7 through 12, inclusive.

7. Respondent's Computation for entry of judgment.
8. Petitioner's Computation for entry of judgment.
9. Memo in support of Respondent's Rule 50 Computation and a copy of the service.
10. Order setting hearing for October 21, 1957, and a copy of service on petitioner.
11. Respondent's Motion for issuance of a Written Memorandum in respect to issues under Rule 50.
12. Print all the testimony in the proceeding had on February 21, 1956, at Oklahoma City, Oklahoma, from top of page 3 to and including last line on page 45.

MOTION FOR ISSUANCE OF A WRITTEN MEMORANDUM IN RESPECT TO ISSUES RAISED IN COMPUTATIONS UNDER RULE 50.

IN SUPPORT THEREOF, the respondent shows the Court that:

(A) the parties were unable to reach an agreement in respect to the following issues:

(1) *Loss on sale of air conditioning equipment.*—The petitioners have filed computations under Rule 50 in which they, for the first time, claim that a loss was sustained on the sale of air conditioning equipment in 1949 by the Finley-O'Shea Construction Company, and that R. E. L. Finley, Dan M. O'Shea and Robert Wesley Finley, as partners in the Finley-O'Shea Construction Company, are entitled to deduct the loss arising from the sale. In the computations under Rule 50 filed by R. E. L. and Jerline Dick Finley and Robert Wesley Finley they deducted in 1949 their respective shares of the loss allegedly sustained on the sale of air conditioning equipment in 1949. In the computations under Rule 50 filed by Dan M. O'Shea, Jacqueline Finley O'Shea and Robert Wesley Finley they claimed net operating losses in 1947 which were attributable wholly or partially to a carry-back to 1947 of the loss allegedly sustained on the 1949 sale of air conditioning equipment. The respondent refused to recognize the losses claimed by the aforementioned petitioners allegedly arising out of the sale of air conditioning equipment for the following reasons:

(a) No issue had been raised in the pleadings in respect to the alleged loss on the sale of air conditioning equipment.

(b) If a loss was sustained on the sale of the air conditioning equipment in 1949, the loss was not recognizable under section 24(b) of the Internal Revenue Code of 1939.

(c) The claim by the petitioners of a loss in respect to the 1949 sale of the air conditioning equipment violated the settlement agreement of the parties.

[APPENDIX]

In Petitioner's Computation under Rule 50, we quote the following:

(J) Net operating loss deduction computed as follows:	
Net operating loss carry-back from 1949	3,179.31
Capital gains adjustment	1,183.85
Net operating loss deduction	1,895.46

In explanation of adjustments, we quote the following:

During the latter part of its fiscal year ended July 31 1949 the Finley-O'Shea Construction Company sold and transferred certain air conditioning equipment to the Rail Fence Operating Company, a partnership organized in 1949 and composed of the following persons: R. E. L. Finley, Jerline Dick Finley, Robert Wesley Finley, Dan M O'Shea and Jacqueline O'Shea. The agreed consideration was $11,205.09, being the book value in the hands of the seller computed as follows:

Book cost January 1, 1948	$21,777.58
Accrued Depreciation Reserve	10,572.49
Book value	11,205.09

The air conditioning equipment was used in the Rail Fence Motel buildings as a part of the property being rented.

Exhibit "R" Appellant's 1949 Tax Return

Schedule "E", Partnership Income:

Finley-O'Shea Construction Company	$1,186.39
Rail Fence Operating Company	($6,574.35)
Net	($5,387.96)

OFFICIAL REPORT OF PROCEEDINGS, Robert Wesley Finley, Docket No. 54202, before Tax Court, February 21, 1956.

(Commencing on page 5 and extending through page 10)

The Clerk: What about 54202?

Mr. Sullivan: 54202 is in dispute.

The Court: No. 54202.

Mr. Sullivan: That's Mr. Robert Wesley Finley, Your Honor.

The Court: Yes.

Mr. Morrison: No. The contribution and the—if there is anything involved the contributions are allowed, and the sales tax—

Mr. Sullivan: There are none. It is our understanding that the only matters that are left in that involve travel and entertainment to items of other dispute.

Mr. Morrison: And the Rail Fence operating account.

The Court: No fraud in that case. You withdrew that?

Mr. Sullivan: That is correct, Your Honor. For the year 1948.

The Court: Now, as I understand it, then, in dockets 54199, 54200, 54201, 54202, 54204, 54205 and 54209 the issue on which we will take testimony will be the travel, automobile, and entertainment expense, and in docket 54202 there will be an additional issue with respect to the Rail Fence.

Mr. Sullivan: Deductions in respect to that: That is correct, Your Honor.

The Court: Now, we will have testimony, then, in all those cases with respect to those matters.

Mr. Morrison: The petitioners are willing to consolidate them under the agreement, try them all at one time.

The Court: Very well. All either of those dockets will be consolidated.

The Clerk: That's 54199, 54200, 54201, 54202, 54203, 54204, 54205, and 54209?

The Court: That's right.

Mr. Sullivan: Might the respondent ask for a clarification at this time, Your Honor, with respect to the scope of the record that will be presented to the respondent? In respect to the earlier cases that have been tried, if there are matters that arise in one group, and also there is a reference in the second group but the record in the second group is not completely comprehensive in respect to that question, is it possible to look at the record for the earlier case that was tried or vice versa?

The Court: You mean these others that we have already tried?

Mr. Sullivan: Yes, Your Honor.

The Court: No.

Mr. Sullivan: Well, Your Honor, the respondent, in respect to docket 54202, has been forced to take an alternative position. Yesterday the respondent placed in evidence testimony with respect to the operations of Rail Fence during the year 1947. Now, that same issue is going to arise in the year 1948. Now, we put that question into controversy because it concerned the overall operation of the Finley-O'Shea Construction Company, and we said that the record is not clear as to who should claim the operating loss. Therefore, to protect the respondent's interest we put that question into controversy yesterday.

The Court: No. The record in each of these three consolidated cases must be complete so that if the Government or petitioner desires to appeal there will be but one record go up. So that if there is evidence that you need now to establish the issue in 54202, even though it is similar to the evidence that was introduced the other day, it will have to be introduced again.

Mr. Sullivan: Then, Your Honor, respondent is in the position where he will have to recall Mr. Thomas to the stand. The respondent did not understand the exact manner in which the record was to be treated, and it was for that reason that we posed the question.

The Court: Well, by any agreement of counsel you can accept the testimony that was given in the other case as being a part of this. But the Court can't rule that because 54202 was not consolidated with the other case.

Mr. Morrison: Your Honor, we will consent that for the purpose of this record—No: on J. T. Thomas I would want the examination in redirect also. And I can't recall just who it was. But I would be willing that all of that testimony be made a part of this record if he wants to make it a part. And I would have to see that I got all the redirect examination on it before I would agree. I believe we better let him bring Mr. Thomas in.

Mr. Sullivan: We are willing to agree that any matters covered on direct or redirect or cross in respect to the Rail Fence operating loss or in respect to the operation of the Rail Fence should made available in this particular docket number, 54202, if that would meet Mr. Morrison's requirement.

Mr. Morrison: You see, Your Honor, the only thing involved here is a $5000 loss which they disallowed—

Mr. Sullivan: No, Your Honor,—

Mr. Morrison: in Mr. "Wes" Finley's tax return as a deduction.

Mr. Sullivan: Your Honor, at the very outset the respondent moved to consolidate these cases because of the complexity of the relationship, and it was the respondent's position that he could not determine precisely what operations encompass the Rail Fence. So we agreed that all matters pertinent to the Finley-O'Shea issue which would be tried in the case of Mr. R. E. L. Finley—

The Court: You didn't agree to that. You ask for that, and the Court did not give it to you. Now, you asked for the consolidation of these cases; that's true.

Mr. Sullivan: That is correct.

The Court: But the Court did not consolidate them.

Mr. Sullivan: That is correct.

The Court: And I think with the concession Mr. Morrison has made that any of the testimony given in the consolidated cases on trial yesterday that is pertinent to the Rail Fence would be applicable to this record is sufficient to take care of you.

Mr. Sullivan: I thought he withdrew that consent, Your Honor. That was the point I was making.

Did you withdraw it?

Mr. Morrison: No, I will still permit that to be done.

Mr. Sullivan: Well, I misunderstood.

The Court: Then the Government is perfectly all right to take alternate positions on this. And I realize the Government has to take an alternate position on this Rail Fence issue. But there is no reason why that couldn't be done with that testimony of the Rail Fence in—Well, let me say this for the Record, then: All of the testimony with respect to the Rail Fence operation given in the consoli-

dated trial of 54206, 54207 and 54208 will be considered part of the record in the trial of docket No. 54202.

Mr. Morrison: Your Honor, I might make this further suggestion: That these cases in these four years are also going to be subject to the Court's determination of who are the partners of the Finley-O'Shea Construction Company and their distributable shares, and these cases will have to wait on the docket until the Court decides that issue and then we agree that it be binding on all these parties in these cases.

So if the Court determines that the Operating Company really is "Wes" Finley with this deduction here, then the trial of this deduction wouldn't make any difference. If the Court distributed the loss in the Rail Fence to the other members, why, then, this loss that has been denied would be also distributed to the other members in determining the Rail Fence loss. So that it's not necessary I don't believe, to have any of that in here under those circumstances. This is just purely a trial on expense accounts.

The Court: Very well.

Are we trying all of these cases, or were you going to try one and let the evidence stand for all of them?

Mr. Morrison: I am going to have each partner testify to his expense.

The Court: All right.

[APPENDIX]

DOCKET NO. 54202, TAX COURT

Robert Wesley Finley vs Commissioner

Docket Entries

1956

Feb. 21—Hearing had before Judge Mulroney on the merits on oral motion to consolidate dkts. 54199 to 54205 Incl. and 54209, granted. Briefs 5/21/56. Replies 6/5/56

May 7—Transcript of hearing 2/21/56 filed.

May 10—Motion for extension of time of 30 days to file brief and 15 days thereafter to file reply brief. filed by petr. 5/11/56 granted.

May 18—Motion for extension of time to July 20, 1956, to file Brief, filed by Respdt. 5/22/56 granted. Served 5/23/56.

Jun 18—Brief filed by Petitioner. Copy served 8/2/56.

Jul 18—Motion for extension of time to 8/1/56 to file brief, filed by Respt. 7/23/56 granted. served 7/25/56.

Jul 27—Amendment to answer to conform to proof, filed by Respt.

Aug 1—Brief filed by Respt. Copy served 8/2/56

Aug 21—Motion for extension of time to Sept. 1, 1956, to file Reply brief, filed by Petr. granted 8/21/56. served 8/31/56.

Aug 29—Answer brief filed by Petitioner. 8/30/56. served.

Aug 29—Objection to respdt's motion to amend, filed by petitioner. 8/30/56 served.

Sept 11—Respt's reply to Petrs. objection of 8/29/56 filed.

1957

Jan 28—Memorandum opinion filed, Judge Mulroney, decision will be entered under Rule 50. served 1/28/57.

Jun 13—Computation filed by resp.

Jun 17—Hearing set July 24, 1957. Rule 50 served 6/18/57

Jul 16—Computation filed by petitioner. served 7/25/57

Jul 24—Hearing had before Judge Murdock under Rule 50. Referred to J. Mulroney.

Jul 24—Order of continuance to the motions calendar of Aug. 21, 1957, entered.

Aug 19—Motion to continue hearing to 10/21/57 (Rule 50) filed by respt. granted 8/20/57. served 8/20/57.

Oct 17—Resp. computation for entry of decision filed.

Oct 17—Memo. in support of Resp's Rule 50 Computation filed served 10/18/57

Oct 18—Hearing set Oct. 21, 1957. Wash D. C. (Rule 50) served 10/18/57

Oct 21—Hearing on Rule 50. CAV Judge Mulroney. Resp. motion for issuance of written memo. filed at hearing. denied 11/7/57. served 11/12/57

Oct 29—Transcript of hearing 10/12/57. filed.

Nov 8—Decision entered, Judge Mulroney. served 11/12/57.

1958

Feb 10—Petition for review by U. S. Ct of Ap 10th Cir. filed by Petr.

Feb 10—Designation of contents of record on appeal filed by Petr.

Feb 10—Proof of service of petition for review filed.

Feb 10—Proof of service of designation of contents of record on review filed.

Mar 5—Order extending time for filing record on review and docketing pet. for review to May 8, 1958.

APPELLEE'S "Supplemental RECORD"
Pages 27-28, and 29:

Q. Did you ever account to Mr. Baughman for this money? (the $9500 check deposited in appellants bank account)

A. Yes, Sir.

Q. How did you account to him for it? A. Well, as it kept dragging on and he obviously sincerely wasn't interested in buying this equipment, only biddin on it, he left that money in my personal account and would draw on it in cash as he needed it. I found out later that the reason he did business that way, handled it that way, is that he didn't want his wife to know that he had this money on the side so he wouldn't have to account to her for how he spent it.

Q. Did you ever at any other time have any money transactions with Roy (Tex) Baughman? A. Yes, sir: several different times.

Q. Usually were those transactions cash transactions or checks?

A. Well, some of them were out of my personal account. It was always just personal between "Tex" and I. I would draw him a check on my personal account or I would give him cash. Most of the money he deposited with me he drew back in cash, explaining to me that he didn't want to get in trouble with his wife. And I got in trouble here!

Mr. Morrison: I wish to offer petitioners' exhibit 62.

Exhibit 62 was admitted. Continuing:

By Mr. Morrison:

Q. I hand you petitioners' exhibit No. 63 and ask you to state what that is. A. It's a personal check drawn by me on my personal account, paid to Mr. "Tex" Baughman for $1,000.00.

Q. What is the date of that check? A. May 28, 1947.

Q. Is it endorsed? A. Yes, sir.

Q. Who endorsed it? A. "Tex" Baughman and then Harold Lock.

Q. Do you happen to know who Mr. Lock is? A. Yes, sir. He sold black-market automobiles.

Exhibit 63 was admitted. Continuing:

Q. I hand you what has been identified as "Petitioners' Exhibit No. 64" and ask you to state what that is. A. It's a personal draft drawn by myself, payable to Roy ("tex") Baughman, for $1,095.95, written July 12, 1947. It's endorsed by Roy ("TEX") Baughman.

Q. When was it canceled? A. July 12, 1947.

Q. Do you have any recollection as to what that check was for? A. No, sir. He was drawing down money to pay for different things, and I was loaning it to him, and I don't recall what he spent it for. I remember the day he came up and asked me for it.

Q. I hand you petitioner's exhibit No. 46, and I will ask you if you remember if it had any connection with that check.

A. This is a check drawn on the First National Bank and Trust Company by Finley-O'Shea Construction Com-

pany, paying Mr. Baughman $1,995.00 on estimate No. such-and-such. This check of $1,995 was endorsed by Mr. Baughman and he gave the check to me, and I secondly endorsed it and cashed it. That was on July 9. And those few days—I don't remember exactly what I needed the money for, but a few days passed and I drew my personal check to pay him back this $1,995.

Q. It was cashed on the same day? A. Cashed on the same day, July 12, 1947.

Exhibit no. 64 was admitted.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and rule involved	2
Statement	4
Argument	9
Conclusion	14
Appendix	15

CITATIONS

Cases:	
Apex Smelting Co. v. *Burns*, 175 F. 2d 978	13
Clason v. *Matko*, 223 U.S. 646	11
Commissioner v. *Ray*, 88 F. 2d 891, certiorari denied, 301 U.S. 711	12
General Utilities Co. v. *Helvering*, 296 U.S. 200	13
Helvering v. *Edison Securities Corp.*, 78 F. 2d 85	
Helvering v. *Salvage*, 297 U.S. 106	13
Henningsen v. *Commissioner*, 243 F. 2d 954	12
International Banding Mach. Co. v. *Commissioner*, 37 F. 2d 660	12
Underwriters Salvage Co. v. *Davis & Shaw Furniture Co.*, 198 F. 2d 450	12
Virginian Ry. v. *Mullens*, 271 U.S. 220	13
Wood, L. A., & Co. v. *Taylor*, 154 F. 2d 548	11
Statutes:	
Internal Revenue Code of 1939:	
Sec. 117(e) (26 U.S.C. 1952 ed., Sec. 117(e))	2, 14
Sec. 272(e) (26 U.S.C. 1952 ed., Sec. 272(e))	3, 11
Internal Revenue Code of 1954, Sec. 7453 (26 U.S.C. 1952 ed., Supp. V, Sec. 7453)	3, 9
Miscellaneous:	
Federal Rules of Civil Procedure, Rule 15(b)	12
Rules of Practice Before the Tax Court of the United States (Revised to August 15, 1955):	
Rule 17(d)	2, 4, 11, 12
Rule 50	8, 13

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 276

ROBERT WESLEY FINLEY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (Pet. App. i-ix; R. 37-45)[1] is not officially reported. The opinion of the court of appeals (Pet. App. x-xv) is reported at 265 F. 2d 885.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1959. The petition for rehearing

[1] Record references ("R.") are to the printed record in Nos. 5901 and 5882 to 5888, inclusive, in the Court of Appeals for the Tenth Circuit, and supplemental record references ("Supp. R.") are to the printed record in Nos. 5871, 5876, and 5878 in that same court.

was denied on May 13, 1959. (Pet. 2). The petition for a writ of certiorari was filed on August 4, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Tax Court did not abuse its discretion by incorporating by reference in the present proceeding, pursuant to the stipulation of the parties, relevant findings of fact concerning two family partnerships made in a companion proceeding involving another partner.

2. Whether the court of appeals correctly held that the Tax Court did not abuse its discretion under Rule 17(d) of its Rules of Practice in permitting the Commissioner to file an amended answer to conform to the proof after the conclusion of the hearing but before the final decision was entered.

3. Whether the court of appeals correctly disallowed a capital-loss deduction claimed by the taxpayer with respect to an alleged sale where the issue was not raised before the Tax Court and no evidence relating to such sale was introduced before that court.

STATUTES AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 117. CAPITAL GAINS AND LOSSES.

* * * * *

(e) [As amended by Sec. 150(f), Revenue Act of 1942, c. 619, 56 Stat. 798] *Capital Loss Carry-Over.*—

(1) *Method of computation.*—If for any taxable year beginning after December 31, 1941,

the taxpayer has a net capital loss, the amount thereof shall be a short-term capital loss in each of the five succeeding taxable years to the extent that such amount exceeds the total of any net capital gains of any taxable years intervening between the taxable year in which the net capital loss arose and such succeeding taxable year. For purposes of this paragraph a net capital gain shall be computed without regard to such net capital loss or to any net capital losses arising in any such intervening taxable years.

* * * *

(26 U.S.C. 1952 ed., Sec. 117)

SEC. 272. PROCEDURE IN GENERAL.

* * * *

(e) *Increase of deficiency after notice mailed.*—The Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed—if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

* * * *

(26 U.S.C. 1952 ed., Sec. 272)

Internal Revenue Code of 1954:

SEC. 7453. RULES OF PRACTICE, PROCEDURE, AND EVIDENCE.

The proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules

of evidence) as the Tax Court may prescribe and in accordance with the rules of evidence applicable in trials without a jury in the United States District Court of the District of Columbia.

(26 U.S.C. 1954 ed., Supp. V, Sec. 7453)

Rules of Practice Before the Tax Court of the United States (Revised to August 15, 1955):

RULE 17. AMENDED AND SUPPLEMENTAL PLEADINGS

* * * *

(d) *To conform pleadings to proof.*—The Court may at any time during the course of the trial on the merits grant a motion of either party to amend its pleadings to conform to the proof in particulars stated at the time by the moving party. The amendment or amended pleadings thus permitted shall be filed with the Court at the hearing or shall be filed in the office of the Clerk of the Court in Washington, D. C., within such time as the Court may fix. (See Rules 4, 5, and 19.)

* * * *

STATEMENT

The relevant facts, as found by the Tax Court (Pet. App. i-ix, xvi-xvii; R. 37-45; Supp. R. 1-17) and by the court of appeals (Pet. App. x-xv), may be summarized as follows:

1. The proceedings here involved relate to the operations of an Oklahoma family partnership, the Finley-O'Shea Construction Company (referred to as "FOSCO"). This partnership was comprised of R. E. L. Finley, his son, Robert Wesley Finley, the taxpayer herein, and other members and in-laws of the Finley

family. During the years in question, 1946 through 1949, FOSCO was engaged in the general construction business and contracted for the construction of public projects. A considerable amount of the construction for which it contracted was completed by subcontractors (Pet. App. x; Supp. R. 4-5).

The partners of FOSCO and their wives filed eleven petitions for redetermination in the Tax Court covering many issues. Some of the issues related only to individual taxpayers, such as the disallowance of travel, entertainment, and automobile expenses. There were, however, two issues common to all the petitions for redetermination relating to the operations of FOSCO and to another family partnership, the Rail Fence Operating Company (referred to in the record and the petition as "FENCO"), which operated a motel.

The parties stipulated in the Tax Court that the eleven dockets would be tried in two consolidated proceedings, the first to include the dockets of R. E. L. Finley and his wife, and the second to include the dockets of the other taxpayers, including Robert Wesley Finley. The two consolidated proceedings would be tried consecutively. The parties also stipulated that all matters relating to FOSCO would be tried in the first consolidated proceeding, and that the Tax Court's determination in that proceeding with respect to such issues would be binding on all the taxpayers in the second proceeding (Appendix, *infra*, pp. 15-18; Pet. App. iv, x, xii-xiii; R. 40).[2]

[2] The above stipulation was entered into on February 11, 1956. On February 14-15, 1956, the Tax Court tried docket

2. In determining the tax deficiencies of the various partners of FOSCO in the first consolidated proceeding, the Commissioner disallowed $57,217.26 of alleged subcontracting expenses of the partnership. This amount was paid to a subcontractor, Baughman, by checks issued over a period of time without the customary invoices to support the payments. The basis for the disallowance was that it had not been shown that the payments were for work performed by a subcontractor, and that the entire amount had been returned to the partnership or to its partners. In attempting to justify the deduction of these expenditures by the partnership, the taxpayer, Robert Wesley Finley testified in the first consolidated proceeding that during 1946 the partnership issued its check in the amount of $9,500 payable to Baughman, who endorsed the check and returned it to the taxpayer, who then deposited it in his personal bank account. The taxpayer also testified that a similar transaction occurred in 1947 involving a check for $1,995. The taxpayer claimed that the proceeds of these checks did not belong to him and gave various explanations for the deposits. These amounts were

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Nos. 43839-43840 involving deficiencies asserted against R. E. L. Finley and his wife for earlier years and involving other issues. The first consolidated proceeding, involving R. E. L. Finley and his wife for the years here in issue and involving, among other questions, the operations of FOSCO and the Rail Fence Operating Company, was tried on February 16, 17, and 20, 1956. The second consolidated proceeding, involving the other members and in-laws of the Finley family, including the taxpayer herein, and also involving the operations of FOSCO and the Rail Fence Operating Company, was tried on February 21, 1956 (Pet. App. xxv, xxx; R. 51).

not reported as part of his income for the years in question, and the Commissioner did not claim either in his notice of deficiency or in his answer to the taxpayer's petition for redetermination that these items were income to the taxpayer. Evidence of the two transactions was not re-offered in the second proceeding (Pet. App. xi, xxxii-xxxiv; Supp. R. 6-7, 24-31, 39, 40-43).

At the close of the second consolidated proceeding, the Commissioner requested permission of the Tax Court to file an amended answer to conform the pleading to the proof. This request was granted without a showing as to what the amendment would be. Approximately five months thereafter, but approximately six months prior to the issuance of the Tax Court's opinion and fifteen months prior to the rendition by the Tax Court of its decision, the Commissioner filed an amended answer in which he alleged that the two items of $9,500 and $1,995 should be treated as income to the taxpayer (Pet. App. xi-xii; R. 36-37, 45, 56).

In its memorandum findings of fact and opinion in the first consolidated proceeding, the Tax Court found that the payments by FOSCO were partnership business expenses and that their deduction should have been allowed. The Tax Court also found that the $9,500 and $1,995 payments were returned to Robert Wesley Finley and deposited by him in his personal bank account (Pet. App. xiii, xvi-xvii; Supp. R. 6-7, 13-14). In its memorandum opinion in the second consolidated proceeding, the Tax Court, referring to the stipulation of the parties, specifically incorpo-

rated by reference the relevant findings made by it in the first proceeding and found and held that the Commissioner had met his burden of showing that the $9,500 and $1,995 were properly includible in the income of Robert Wesley Finley for 1946 and 1947, respectively (Pet. App. iv-v, xii-xiii; R. 40-41). The Tax Court also held that the Commissioner's amended answer was timely filed (Pet. App. ix, xi-xii; R. 44-45). The court of appeals affirmed these determinations (Pet. App. xiii-xv).

3. In his notice of deficiency, the Commissioner also determined that FOSCO had claimed an excessive amount of depreciation on air-conditioning equipment owned by it. FOSCO had constructed a motel which was operated under the name Rail Fence Motel and had purchased air-conditioning equipment which it installed in the motel. During the Tax Court proceedings the parties agreed upon the amount of the depreciation deduction which would be allowed for the air-conditioning equipment and this issue was not discussed by the Tax Court in its opinions. When the taxpayers filed their computations under Rule 50 with the Tax Court, they claimed a capital loss for 1949 upon an alleged sale of the air-conditioning equipment in that year by FOSCO to the Rail Fence Operating Company, as well as a capital-loss carryback on the sale from 1949 to 1947. The Tax Court's decisions disallowed any capital-loss deduction or capital-loss carryback (Pet. App. ix, xv, xvii, xxii-xxiv; R. 22-23, 25-27, 45; Supp. R. 5-6).

On appeal, the taxpayer, Robert Wesley Finley, did not raise any question as to his right to a deduction

for a capital loss or capital-loss carryback on any alleged sale of this equipment in 1949 by FOSCO to the Rail Fence Operating Company. He contended, instead, that he was entitled to a capital loss for 1949 and a capital-loss carryback to 1947 by virtue of an alleged sale of this equipment in 1949 by the Rail Fence Operating Company to Harrison & Chance. The court of appeals denied these claimed deductions on the ground that "the record contains no information as to the sale and there is no indication that the Tax Court ever considered the question" (Pet. xv). Tax Court ever considered the question". (Pet. App. xv).

ARGUMENT

The questions presented relate primarily to the discretion of the Tax Court in conducting its hearings. The taxpayer has not shown that the Tax Court failed to reach a proper decision or that its proceedings were conducted in such a manner as to violate the applicable statutory provisions and rules governing its practice and procedure.

1. Petitioner contends (Pet. 15-22) that the evidence upon which both courts below relied to include the $9,500 and $1,995 amounts in his income was not part of the record in the second consolidated proceeding in which he was a party and therefore was not applicable to him. This contention is clearly without merit.

In accordance with Section 7453 of the Internal Revenue Code of 1954, *supra*, pp. 3-4, the Tax Court has broad discretion to regulate the conduct of its hearings. In the present case, on February 14, 1956, at the beginning of the Tax Court hearings involving

all the taxpayers, their counsel objected to having all eleven petitions for redetermination consolidated into one hearing. He stipulated instead that the cases should be tried in two consolidated proceedings, the first to involve R. E. L. Finley and his wife, and the second to involve all the other taxpayers. He further stipulated at that time that all matters concerning the operations of FOSCO should be tried in the first consolidated proceeding of R. E. L. Finley and his wife and that the Tax Court's determination in that case relative to such issues should be binding upon the other taxpayers in the second consolidated proceeding (Appendix, *infra*, pp. 15-18; Transcript of Testimony, T.C. Nos. 43839-43840, pp. 46-50). Accordingly, there is no merit to the taxpayer's contention (Pet. 6-8, 17, 19-20) that when his case was reached for trial on February 21, 1956, the only stipulation entered into by him related to the Rail Fence Operating Company (Pet. App. xxv-xxix; R. 51-55). Such a contention completely ignores the fact that some seven days before the FENCO stipulation taxpayer's counsel had entered into another stipulation concerning FOSCO's operations.

The Tax Court's findings in the first proceeding (Pet. App. xvi-xvii; Supp. R. 6-7, 13-14), that the $9,500 and $1,995 payments were returned to the taxpayer and were deposited by him in his personal bank account, relate to the operations of FOSCO, as the court of appeals correctly held (Pet. App. xiii). Thus, the Tax Court could rely in good faith upon the terms of the stipulation and conclude that it was not required to hear the same evidence in successive trials. The Tax

Court properly referred to evidence introduced in the first proceeding in order to arrive at a determination that certain amounts paid by FOSCO to one of its subcontractors were returned by the subcontractor to the taxpayer herein and were includible in his income. *Clason* v. *Matko*, 223 U.S. 646, 652; *L.A. Wood & Co.* v. *Taylor*, 154 F. 2d 548, 550 (C.A. 5).[*]

2. The taxpayer also asserts (Pet. 15-22) that both courts below erred in permitting the Commissioner to charge the taxpayer with the $9,500 and $1,995 items as income by amending his answer to conform to the proof. This contention likewise is without merit.

Section 272(e) of the Internal Revenue Code of 1939, *supra*, p. 3, confers jurisdiction upon the Tax Court to determine an increased deficiency if a claim therefor is asserted by the Commissioner at or before the hearing. By Rule 17(d) of the Rules of Practice Before the Tax Court of the United States (Revised to August 15, 1955), *supra*, p. 4, the Tax Court may in its discretion "at any time during the course of the trial" permit a party to amend his pleadings in stated particulars "to conform to the proof," and may allow such amended pleadings to be filed either "at the hearing" or "within such time as the Court may fix." The courts of appeals have construed these provisions as giving to the Tax Court broad discretion to

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[*] Contrary to the taxpayer's unsupported contention (Pet. 10-11, 19), there was sufficient evidence in the record of the first consolidated proceeding from which the Tax Court could determine, (Pet. App. v) that the Commissioner had met his burden of showing that the payments represented income to the taxpayer (see Supp. R. 21-43).

permit the filing of such amended pleadings at any time before it enters its final decision. *Henningsen* v. *Commissioner*, 243 F. 2d 954, 959 (C.A. 4); *Helvering* v. *Edison Securities Corp.*, 78 F. 2d 85, 90-91 (C.A. 4); *Commissioner* v. *Ray*, 88 F. 2d 891 (C.A. 7), certiorari denied, 301 U.S. 711; *International Banding Mach. Co.* v. *Commissioner*, 37 F. 2d 660 (C.A. 2).

Here the Commissioner at the conclusion of the taking of testimony in the consolidated proceeding involving the taxpayer, requested permission to file an amended answer to conform to the proof (R. 56); the amendment related solely to evidence which both the taxpayer and the Commissioner previously had introduced; the taxpayer had an opportunity to introduce evidence on this issue and had actually done so (Pet. App. xxxii-xxxiv; Supp. R. 24-31); and the amended answer was filed approximately five months before the Tax Court issued its opinion and fifteen and one-half months before it entered its decision (Pet. App. ix; R. 37, 45). Accordingly, the taxpayer was not misled by the filing of the amendment and the Tax Court did not abuse its discretion in permitting such filing.[1]

3. The taxpayer contends (Pet. 11-15) that the court of appeals erred in denying him a deduction for a capital loss or capital-loss carryback upon an alleged

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[1] As the court of appeals stated (Pet. App. xiv-xv), a liberal construction of Rule 17(d) is consistent with the trend of judicial decisions authorizing amendments to the pleadings to conform to the evidence under Rule 15(b) of the Federal Rules of Civil Procedure. See, *e.g.*, *Underwriters Salvage Co.* v. *Davis & Shaw Furniture Co.*, 198 F. 2d 450, 453 (C.A. 10).

sale in 1949 of air-conditioning equipment by the Rail Fence Operating Company to Harrison & Chance. As the court of appeals stated (Pet. App. xv), however, "the record contains no information as to the sale and there is no indication that the Tax Court ever considered the question." It is well settled that an issue which was not presented to the trial court cannot be advanced on appeal as a ground for reversal. *General Utilities Co.* v. *Helvering*, 296 U.S. 200, 206-207; *Helvering* v. *Salvage*, 297 U.S. 106, 109; *Virginian Ry.* v. *Mullens*, 274 U.S. 220, 227-228. No exceptional circumstances exist in the present case which would have justified the court below in making an exception to this general rule.[6] The issue is solely one of fact, and, if it took place, the taxpayer must have been aware of such a sale by a partnership of which he was a member in sufficient time to have presented relevant evidence in the Tax Court proceedings.[7]

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[5] The record in this case, including the Rule 50 computation in the Tax Court, shows that the only sale of the air-conditioning equipment alleged by the taxpayer to have taken place was a sale in 1949 by FOSCO to the Rail Fence Operating Company. The Tax Court's decision disallowed any deduction for this sale, and the taxpayer did not raise this issue on appeal (see Pet. App. ix, xxii-xxiv).

[6] The liberalized rule which permits a party to amend a pleading to conform to the proof prior to the rendition of a final decision does not extend to permit a losing party after rendition of a final decision to advance a new theory on appeal as a ground for reversal. *Apex Smelting Co.* v. *Burns*, 175 F. 2d 978 (C.A. 7).

[7] Under no circumstances would the taxpayer be entitled to any net capital-loss carryback from 1949 to 1947. The 1939 Code has no provision which permits a taxpayer to

CONCLUSION

Since the decision below turns on its particular facts and is not in conflict with any other decision, it presents no question of general importance requiring review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER 1959.

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claim a capital-loss carryback. Instead, Section 117(e), *supra*, pp. 2-3, the relevant provision, only permits a capital loss carry-over, and none of the years after 1949 are in issue here with respect to the taxpayer.

APPENDIX

R. E. L. Finley v. *Commissioner*, T. C. Nos. 43839-43840, Transcript of Testimony, pp. 46-50:

* * * * *

[Tr. 46] THE CLERK: Court is in session.

THE COURT: Mr. Morrison, what sort of consolidation do you think that these cases would lend themselves to? It seems to me now we have the three partnerships here, haven't we?

MR. MORRISON: Just two partnerships, Your Honor. The Finley-Frasier Company never was a partnership in that sense.

THE COURT: I see. But the Midwest Materials [Tr. 47] & Construction Company is a recognized partnership?

MR. MORRISON: Yes.

THE COURT: And the Finley-O'Shea Construction Company is a recognized partnership?

MR. MORRISON: That's right.

THE COURT: It strikes me the whole case could be consolidated—that is, all the cases—and file one brief with divisions in it, taking up the problems of each case. I think it would be easier for you and easier for everybody if that were done.

I know the Court has the right on its own motion to consolidate these cases, but I am reluctant to do it in the face of any objection. But I would

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Copies of the printed record on appeal in the Tenth Circuit in the case of *R. E. L. Finley* v. *Commissioner*, Nos. 5734-5735, which affirmed the Tax Court decisions in Nos. 43839-43840, are on file in the present proceeding in this Court. Pages 66 through 68 of the printed record include pages 48 through 50 of the transcript of testimony set forth above.

think it would be easier because there are certain issues that are going to be central to every case. Isn't that true?

MR. MORRISON: The determination of the issues in this first case will carry some issues over, but they can be adjusted. They won't need any trial of the issues in those cases. Now, I have about six or seven clients, and they each have something. They don't want to put it all in one big record. If they want to appeal they won't have to take all the records up. And we want to keep those issues separate.

THE COURT: Well, what are those issues?

MR. MORRISON: Well, Mrs. Finley has no interest in the Finley-O'Shea Construction Company at all. And the Barrys have no interest in the Finley-O'Shea Construction Company.

[Tr. 18] THE COURT: Well, let's get these. Dockets 43839 and 43840 are to be tried together, is that right?

MR. MORRISON: Yes, I will consent to that.

THE COURT: And how about any of the rest of them?

MR. MORRISON: Well, we will stipulate that we can try one case and try all the Finlay-O'Shea matters in that case.

THE COURT: What case will that be?

MR. MORRISON: Well, I don't care. I would try "Bob" Finley's part. And then we will make a stipulation that the determination in that case, as far as Finley-O'Shea and its distribution, will be binding on all of them.

THE COURT: Is that R. E. L. Finley?

MR. MORRISON: Yes sir; that's right.

THE COURT: Now, any other case?

MR. MORRISON: The others will have to be tried separately, Your Honor.

THE COURT: Now, there is R. E. L. Finley, and then there's Robert Wesley Finley?

MR. MORRISON: That's his son, Your Honor.

THE COURT: All right. Well, let's proceed, then.

MR. SULLIVAN: Your Honor, respondent would like to point out the following things: That Jerline Dick Finley is a party in the second group of cases for she has a community property interest which is in controversy, and she carries a separate docket number, 54207. And the docket number for R. E. L. Finley for 1946 and 1947 is 54206. And then there are some issues involving Mrs. Jerline Finley that appear in both years. And there are also some issues in respect to the disposition of equipment which occur in the year 1946.

[Tr. 49] THE COURT: Mr. Morrison, could 54206, 54207, and 54208 be put together with 43839 and 43840? They are all the same persons there; that is, R. E. L. Finley and Jerline Finley.

MR. MORRISON: I know. But if I stipulate that those other parties that don't have any interest in that first year,—if I stipulate it all has to be tried together, then their business is tied up with a big record here; whereas if we just try one of those Finley-O'Shea's, they are willing to be bound by that. But they don't want to tie up their returns with somebody's tax return that they have no issue on.

THE COURT: Well, these are separate cases. Those are R. E. L. and Jerline in five dockets. R. E. L. and Jerline are in five dockets. Can all of their cases be tried together? They are in five dockets. Just standing alone.

MR. MORRISON: I know they are. But this big

issue of The Finley-O'Shea Construction Company and "Bob" Finley would be in one of those dockets, and these other parties don't want to make one record in it and tie it together with Midwest Materials Company. Now, we will try one of them, any one of those in those later dockets, that involves Finley-O'Shea, and then all the rest of them will stipulate that the decision of the Court in that case on the Finley-O'Shea distribution, etc., will be binding on all of them.

[Tr. 50] THE COURT: All right. Let's proceed as we go along, then.

MR. SULLIVAN: Your Honor, the respondent would like to request that, in the light of the Court's decision that the matters be separated, that at least the second group of cases be immediately called at the conclusion of the case and that the record of the first group of cases be available for reference and used if necessary.

THE COURT: Oh, yes. We are going right on from one case to the other. There is no question about that.

Call your witnesses.

MR. MORRISON: Call Mrs. Finley.

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